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CONFUSING ‘BUNDLING’ WITH ‘TYING’ UNDER ARTICLE 82 EC: ‘BATTERIES INCLUDED’ OR ‘IT ONLY COMES WITH FRIES’

Robert M. Schwartz*

As the title of this article suggests, business practices called “bundling” and tying are widespread and ubiquitous. Bundling and tying are terms commonly used to describe business practices engaged in by undertakings at every level of economic power.¹ In nine separate instances, the Court of First Instance (“CFI”) in its *Microsoft Decision*² (“CFI Judgment”) held that the European Commission³ (“Commission”) had established Microsoft Corporation’s practice of “abusive bundling.”⁴ This

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1. See, e.g., *Cascade Health Solutions v. Peacehealth*, 515 F.3d 883, 895 (9th Cir. 2008) (“*Cascade*”):

The varied and pervasive nature of bundled discounts illustrates that such discounts transcend market boundaries. On the one hand, the world’s largest corporations offer bundled discounts as their product lines expand with the convergence of industries. On the other hand, a street-corner vendor with a food cart—a merchant with limited capital—might offer a discount to a customer who buys a drink and potato chips to complement a hot dog. The fact that such diverse sellers offer bundled discounts shows that such discounts are a fundamental option for both buyers and sellers. . . . Bundled discounts generally benefit buyers because the discounts allow the buyer to get more for less.

(Footnotes omitted.) See also

The most robust statement one can make about tying is that it is ubiquitous In a certain sense, as Robert H. Bork noted in his famous book, “Every person who sells something imposes a tying arrangement. This is true because every product or service could be broken down into smaller components capable of being sold separately, and every seller refuses, at some point, to break the product down any further.

Christian Ahlborn, David S. Evans, and A. Jorge Padilla, *The Antitrust Economics of Tying: A Farewell to Per Se Illegality*, 49 *Antitrust Bulletin*, 287,287-288 (2004) (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX*, 378-379 (1978)).

2. Case T-201/04, *Microsoft Corp. v. Comm’n*, ECR 2007 II-03601 [hereinafter the “CFI Judgment”].

3. Commission Decision relating to a proceeding pursuant to Article 82 of the EC Treaty, 2004 O.J. (L 32). [hereinafter the “Commission Decision”].

4. See CFI Judgment, *supra* note 2, at ¶¶ 840, 841, 866, 941, 973,976, 1058, 1167 & 1232.

was the first time a European Community Court ("Community") had used the term (appearing nowhere in the Commission Decision). The CFI also upheld the Commission's findings by indiscriminately referring to them as either tying or bundling and justifying the result because it "can be deduced both from the very concept of bundling and from the case-law. . . ."⁵ The *CFI Judgment* was followed by the Commission's issuance of its Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings and its Reissued Guidance.⁶ The Reissued Guidance applies the same standards for evaluating bundling practices as they do to evaluating tying practices and equate coercion (contractual) with inducement (cheaper prices).⁷

This raises some knotty questions. First, what exactly is the very concept of bundling? Is bundling a precise synonym for tying? Does such a conflation of legal terms constitute guidance or a hindrance in understanding abuses by a dominant undertaking under Article 82 EC? Does the very concept of bundling lead inexorably to a finding of abuse under Article 82? Can the degree or effect of different forms of practices accurately predict competition abuses by categorizing them as either bundling or tying? Do formalistic tests applied to bundling or tying provide competition law answers to the economic realities of business, especially for innovation industries? Last, does guidance from two recent European Court of Justice ("ECJ") cases provide a better framework than aggressive application of poorly defined, broadly applied labels?

This article examines several points: first, the *CFI Judgment* used the terms bundling and tying interchangeably which the CFI appeared to consider as separately named but functionally identical legal conclusions

5. See *CFI Judgment*, *supra* note 2, at ¶ 859.

6. *Communication from the Commission: Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, at 7, COM 832 (2008) (February 24, 2009) which was followed by the *Communication from the Commission: Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, at 7 (Text with EEA relevance) O.J. C 45, (February 24, 2009) [hereinafter "Reissued Guidance"].

7. Compare Reissued Guidance, *supra* note 6, at ¶ 48 (defining tying by coercion and bundling defined by pricing) with ¶ 50 Fn 34, 51-58 (stating test for "tying" and applying it to bundling behavior). Para 52 adds pricing below LRAIC to its tests for market foreclosure effects. Pricing above LRAIC is somewhat problematical to prove in IPR based industries, or for multi-product bundles where allocation of sunk costs, low marginal costs or projections are difficult to prove as an "objective justification." See Commission Staff Working Document, *Explanatory Memorandum of the Commission Recommendation*, available at: http://ec.europa.eu/information_society/policy/ecomms/doc/library/recomm_guidelines/acc_separ_ca/legisclean.pdf (last visited June 9, 2009).

Study on the implementation of cost accounting methodologies and accounting separation by telecommunication operators with significant market power, Prepared for the European Commission DG Information Society, 3rd July 2002 at 2.5.4 Cost Standards (Standard sensitive to assumptions, and using a historical cost base for LRAIC does not make "economic sense.")

termed abusive bundling and abusive tying.⁸ Second, this ignores a significant body of legal and economic analyses of various business practices termed bundling or tying and evaluations of the effects of different forms of the practices on competition. Third, law values precision in the use of words. The legal syllogisms comprising terms such as "tort," "delict," "breach," and "violation" are linguistic building blocks with which jurists and lawyers alike communicate complicated interactions between law and facts. This also makes it easy to misconstrue shorthand statements of complicated ideas.

My search for juridically useful definitions for bundling or tying as terms describing an abuse (or not) has however, proved elusive. I have been unable to discover generally accepted root definitions of these terms that could supply a baseline from which to trace their development. Economists, lawyers, judges, and the Commission use many conflicting definitions of the terms and their permutations. So much so, that the terminology, in the end, proves unhelpful in indicating whether or not behavior so denominated distorts trade in the Community. This situation is similar, in some respect to the way the broad definition of the term "agreement" in Article 81 EC or "contracts" in Section 1 of the Sherman Act⁹ are not considered the object of competition rules since they all impose restraints in some manner.¹⁰ Consider, as Justice Brandeis observed, "it is the effect of the agreement, not its denomination as such that is the law's concern."¹¹ The "very concept of the [terms] bundling or bundle or tying should not be a loose linguistic test of legality. Adjectival descriptions that distinguish actions taken by an undertaking in the course of its business provide a somewhat better filter."¹² However, in the final analysis, consideration of effects suggested by adjectival modifications of the term bundling should be separate from its general definition.

Denominating legal doctrine as both bundling and tying applies equally to the supply of hamburgers and patent pools. This provides satisfaction in the form of a single, simple definition but, at the same time, creates the impossible task of applying it to dissimilar business situations.

8. Terms which do not appear in the Commission Decision.

9. 15 U.S.C. § 1 (2004).

10. In *Standard Oil Co. v. United States*, 221 U.S. 1,63,(1911) (the Court, in imposing the U.S. "Rule of Reason" observed that a literal interpretation of the language in the Sherman Act "would require the conclusion . . . that every contract, act, or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute. . .").

11. *See, e.g., Board of Trade of Chicago v. United States*, 246 U.S. 231, 238, (1918) (Brandeis J.), ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

12. The term "tying" used as an abuse should be approached carefully when its effect is alleged to arise from non-contractual coercion because even when a practice is considered "tying" it still may have procompetitive effects. *See Jefferson Parish Hospital District No. 2, v. Hyde*, 466 U.S. 2, 12, (1984) [hereinafter "Jefferson Parish"].

One may apply the *Hilti* test and attempt to bring one's own pepperoni in to a neighborhood pizzeria.¹³ However, the restaurateur may not appreciate a customer's meddling with his/her tying market in pizza toppings. Likewise, physically placing several goods in one package or charging a lower price to a buyer who purchases a product range have both been termed bundling. Business practitioners thus become subject to the same legal standard regardless of differences in the product, the market in which the defined practice occurs, or the rationale for the behavior. Confusion engendered by such name games is further complicated when imprecise legal templates are applied to the not-well-defined realm of "special responsibility" under Article 82 EC.

I. WHY IS IT IMPORTANT TO DISTINGUISH BETWEEN THE TERMS 'BUNDLING' AND 'TYING'?

The CFI's gerund phrase confusion with respect to the legal conclusions it terms bundling and tying and its verb confusion when examining the practices it terms "bundle" and "tie" are likely to have deleterious effects on the law of dominant undertakings under Article 82. A tendency to fit every possible example of a behavior into short legal rubrics or economic theories creates a danger that forms of benign business behavior will be tarred with the same brush and labeled as abusive. This results in far too many false positives and a waste of regulatory resources upon practices having little potential to distort competition.

Another apparent consequence of using these terms indiscriminately is that it makes it very difficult to apply economic analyses, (which have their own peculiarities of definition) to the facts of a case. When bundling and tying are considered to be fungible it isn't important to look closely into whether or not an economic theory is appropriate to an aspect of the practice. "Near monopoly", and "de facto monopoly" are not the same conditions as actual monopoly in the operation of theoretical or empiric economic measurement. This becomes important when considering the premises of the "Chicago School," the "Neo Chicago School," and the "Post Neo-Chicago School" on the effects of bundling and tying.¹⁴

A. THE STRUCTURE OF ARTICLE 82 REQUIRES THAT COMMUNITY

13. Case T-30/89, *Hilti AG v Comm'n*, 1991 E.C.R. II-01439, para. 8 [hereinafter "*Hilti*"].

14. See discussion of CFI Judgment, *supra* note 2, at 128.

INSTITUTIONS USE CLEAR LANGUAGE TO DEFINE ITS BOUNDARIES

The language of Article 82 EC itself is very elastic and its boundaries are often not clear. As the late Mr. Justice Laddie observed:

It is the nature of Article 82 that it is susceptible to vague or imprecise allegations. That means that it may be difficult sometimes to strike out an unmeritorious claim or defence and then the parties are faced with the daunting prospect of a lengthy dispute involving no doubt economic evidence simply because the court cannot be certain at an early stage that there is nothing in the plea. On the other hand, because the adverse consequences of allowing a plea under Article 82 into a case are so severe and may involve enormous cost, not just to the parties but to court time, it is incumbent upon the court to look carefully at what is and what is not pleaded.¹⁵

These malleable boundaries are especially problematic in innovation industries where products and practices are not easily fitted into legal rules and categories developed in, and applied to, static economies.

Accordingly, clarity and precision of expression are especially important in this difficult area. The Commission's recent filing of a statement of objections against Microsoft with respect to its tying of Microsoft's browser to its operating system highlights the problem.¹⁶

B. WHAT EXACTLY ARE 'BUNDLING' AND 'TYING': WHY SHOULD WE CARE?

The terms bundling and tying are not used in either Article 81 or Article 82 EC which speak of "... supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."¹⁷ "Under the language of Article 82 EC neither bundling nor tying "practices" are considered to be "abuses" by a dominant undertaking "insofar as it may affect trade between the Member States." In other words, it is not the practice but the effects of a practice by a dominant undertaking constituting an abuse (or the object or effect of an

15. *Her Majesty's Stationery Office and Another v. The Automobile Assoc. Ltd.*, [2001] EWHC (Ch) 34, [21] (Eng.) (dismissing assertion of defense that licensor was a dominant undertaking whose licensing practices were an abuse of Article 82 EC).

16. See European Commission Memo /09/15, *Antitrust: Commission confirms sending a Statement of Objections to Microsoft on the tying of Internet Explorer to Windows* (Jan. 17, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/15> (last visited Jan. 22, 2009).

17. See Treaty Establishing the European Community, Nov. 10 1997, 1997 O.J. (C 340) 3 art. 81(1)(e) and art. 82(d) [hereinafter EC Treaty] (These factors are not an exclusive list of offenses under these Articles. However, they are the textual description of the offending practice.).

agreement, decision or concerted practice). The legal conclusion that the undertaking engages in a business practice violating the treaty is what Community Courts have historically referred to as tying. Tying is not always synonymous with bundling since tying may also include a negative obligation that a customer not obtain substitutes or purchase some other good or service from a competitor or obtain a second good in no fixed ratio to the first.¹⁸ Bundling may be analogized to tying¹⁹ but is analogy enough to make them synonyms? One might view tying (when defined as an offense) as a descriptive verb or noun describing an unlawful effect much like “murder” describes an unlawful homicide but not all homicide. The key problem is the difficulty of defining when, how and if, such an “ubiquitous”²⁰ practice or set of practices contravenes competition law.²¹

1. Tying practices

While the term tie or tying is often referred to as separate practices, their true significance is the connection of some business practice to some coercive act.²² This has been consistently stated in the U.S. cases that

18. The Hilti case is a good example of tying effects without bundling. The undertaking was found to have performed all of the following of which only one can be considered true “bundling”:

The essential features of that infringement are:

1. tying the sale of nails to the sale of cartridge strips
2. reducing discounts and adopting other discriminatory policies when cartridge strips were bought without nails
3. inducing independent distributors not to fulfill certain orders for export
4. refusing to fulfill the complete orders for cartridge strips made by established customers or dealers who might resell them
5. frustrating or delaying legitimately available licenses of right under Hilti’s patents
6. refusing without objective reason to honour guarantees
7. operating selective and discriminatory policies directed against the business both of competitors and their customers
8. operating unilaterally and secretly a policy of differential discounts for supported and unsupported plant-hire companies or dealers in the UK.

Hilti, *supra* note 13, at 8. Please note that only infringement number 1 may be related to “pure bundling.”

19. See Daniel A. Crane, *Mixed Bundling, Profit Sacrifice and Consumer Welfare*, 55 EMORY L.J. 423, 429 (2006) [hereinafter “Mixed Bundling”] (citing LePage’s, 324 F.3d at 155) (asserting that bundled discounts “are best compared with tying, whose foreclosure effects are similar), and RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, 328 (7th Ed. Aspen Publishers 2007) [hereinafter “Economic Analysis of Law”].

20. Christian Ahlborn, *Farewell to Per Se*, 49 Antitrust Bull., 287 (2004).

21. Compare e.g., the approaches under the Sherman Act in the U.S. regarding the leveraging effects of bundling on market entry of Cascade, 515 F.3d, 883, (bundled discounts) with LePage’s Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) (en banc), cert. denied, 542 U.S. 543 (2004) [hereinafter “Le Page’s”] (Bundled-discount rebates).

22. See Cascade, 515 F.3d at 900 (In a normal tying case the plaintiff must prove coercion.), “Not all tying arrangements are illegal. Rather, ties are prohibited where a seller “exploits,” “controls,” “forces,” or “coerces” a buyer of a tying product into purchasing a tied product.” Rick-MikEnters. Inc. v. Equilon Enters., LLC, 532 F.3d 963, 971 (9th Cir. 2008), Bruce Kobayashi, *Kobayashi Survey*, 1 J. COMPETITION L. & ECON. 707 (2005) at 711, David

originally created and defined the terms.²³ Tying is often defined as a seller conditioning the sale of a product or service on the purchase of a second product or service (as opposed to bundling which is generally defined the sale of two or more products or services sold in fixed proportions), while in "tie-in" sales consumers are compelled under contract to purchase all future tied products from the tying firm.²⁴ This is also a common feature of Community law.²⁵ In the E.U., the use of the terms tie and tying had, up until the *CFI Judgment*, generally been used to signify the ultimate legal conclusion.²⁶ In the U.S., there was great initial hostility to such contracts when tying was first analyzed from an antitrust perspective. As Justice Frankfurter at the time wrote "[t]ying agreements serve hardly any purpose beyond the suppression of competition."²⁷

The terms tying or "tie" however have meanings in both contractual and in economics contexts.²⁸ Legal analyses of tying arose out of examinations of contractual provisions that courts concluded coerced

Evans, *Bundle and Tie*, 22 Yale J. on Reg. 37 (2005) at p. 54.

[Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.]

Jefferson Parish, 466 U.S. at 12, *see also* Illinois Tool Works Inc., v. Independent Ink, Inc., 547 U.S. 28, 33-35 (2006) [hereinafter "Illinois Tool"].

23. This is exemplified by the first US cases under the "Patent Misuse" doctrine, which defined the practice which was later adopted by antitrust law. *See, e.g.*, Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 (1942) (leases of patented machines), Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944) (patent license), International Salt Co. v. United States, 332 U.S. 392 (1947) (leases of patented machines). *See also* Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 305-06 (1949) (agreements analyzed under the Sherman Act).

24. Alan Devlin, *A Neo-Chicago Perspective on the Law of Product Tying*, 44 AM. BUS. L. J. 521 (Fall 2007) ("A Neo-Chicago Perspective.") (citing Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION (4th ed. 2005)).

25. *See, e.g.*, Nick Economides & Ioannis Lianos, *The Elusive Antitrust Standard on Bundling in Europe and in the United States at the Aftermath of the Microsoft Cases*, NET Institute Working Paper No. 07/47, (Sep. 25, 2008) ("The Elusive Antitrust Standard") at p.29, available at <http://ssrn.com/abstract=1078932> (last visited Feb. 6, 2009):

It is a common feature in EC and U.S. antitrust law that bundling of two distinct products does not constitute tying unless there has been an effective limitation of the consumers' choice (or coercion) to purchase the products separately.

26. *See, e.g.*, Case 85/76, Hoffman-La Roche v. Comm'n [1979] E.C.R. 0461 at ¶ 89 (Tying without formal obligations) and ¶ 115 (tying using contractual obligations) ("Hoffman-La Roche"); Comm'n Decision 88/518, 1988 O.J. (L 284) 41 (Case No. IV/30.178 Napier Brown – British Sugar) ("British Sugar") (rebate scheme requiring members to "tie-in" other companies to exclusive purchase arrangement).

27. Standard Oil, 337 U.S. at 305-306.

28. David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence From Competitive Markets and Implications for Tying Law*, 22 YALE J. ON REG. 37, 54 (Winter 2005) (Note that we use "tying" strictly in an economic sense; only a subset of economic ties might ever be considered anticompetitive.) [hereinafter "Bundle and Tie"].

purchasers and licensees into accepting unwanted goods and services or into refusing to obtain them elsewhere.²⁹ Indeed the test used in *Jefferson Parish* was specifically aimed at determining whether a contract, as opposed to a practice, had tying effects.

2. Bundling practices

Bundling is closely related to tying but is not identical to it. However it has been analogized to tying and tests designed to analyze tying are applied to bundling.³⁰ Tests applied to contractual tying may have different results when applied to bundling practices.³¹ Some bundling practices as generally understood are listed below along with the subdivisions of each practice defined in a variety of contexts. Bundling has been termed, “abusive,”³² “mixed,”³³ “pure,”³⁴ “discriminatory,”³⁵ “technical,”³⁶ “price,”³⁷ “product,”³⁸ “predatory,”³⁹ “collective,”⁴⁰ “physical,”⁴¹

29. See, e.g., *Hoffman-La Roche*, *supra* note 26, at ¶ 87 (contracts providing for rebates), Case 333/94 P, *Tetra Pak Int'l SA v. Comm'n of the European Cmty*, 1996 E.C.R. I-0595, ¶ 2 (quoting the grounds of the Comm'n's decision.), *British Sugar*, *supra* note 26 (contractual commitment to “tie-in” other undertakings); see also *Jefferson Parish*, 466 U.S. 2, (contract for anesthesiology services), *Morton Salt Co. v. G.S. Suppiger Co.* 314 U.S. 488 (1942), *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944).

30. See *Crane*, *supra* note 19, at 429 n.20, citing *LePage's Inc. v. 3M*, 324 F.3d 141, 155 (3d Cir. 2003) (“LePage”) (quoting 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* P 749, 83 (Supp. 2002) (asserting that bundled discounts “are best compared with tying, whose foreclosure effects are similar”)).

31. Case T-210/01, *General Electric Co. v. Comm'n of the European Cmty*, 2005 E.C.R. II-05575 at ¶ 89 [hereinafter “GE”] (“[P]ure bundling is conceivable only where the customers are the same for each product, it should be noted that, in cases in which a platform is multi-source . . . the scope for pure bundling is very limited.” This would not necessarily be the case for contractual tying which depends upon contractual terms which can overcome such economic considerations.)

See also Stan J. Liebowitz & Stephen E. Margolis, *Bundles of Joy: The Ubiquity and Efficiency of Bundles in New Technology Markets*, 5 J. COMPETITION L. & ECON. 1, 5 (2009) [hereinafter “Bundles of Joy”] (bundling is incompatible with “a la carte” pricing (paying for the exact amount of each item consumed) while contractual tie-ins are not).

32. CFI Judgment, *supra* note 2, at ¶¶ 840, 841, 866, 941, 973, 976, 1058, 1167 & 1232.

33. *Crane*, *supra* note 19, at 425. Bruce H. Kobayashi, *Does Economics Provide a Reliable Guide to Regulating Commodity Bundling By Firms? A Survey of the Economic Literature*, 1 J. COMPETITION L. & ECON. 707, 711 (Dec. 2005). [hereinafter “Kobayashi”].

34. Kobayashi, *supra* note 33, at 710. See also *Crane*, *supra* note 19 at 429 (pointing out that bundled discounting is similar to what has been termed “tying” by the courts and commentators. However, he cautions against treating an analogy to the practice as its’ definition for to do so would duplicate the errors of the early tying cases which provided hostile to a pervasive and generally pro-competitive practice.). See also *Comanor*, *infra* note 160, at 400 (pointing out that while bundled discounts may create *de facto* tying arrangements they differ from explicit ties in terms of their different pro-competitive justifications.).

35. Herbert J. Hovenkamp & Erik N. Hovenkamp, *Exclusionary Bundled Discounts and the Antitrust Modernization Commission*, Univ. of Iowa Legal Studies Research Paper No. 08-13, 15 (June 2008) available at <http://ssrn.com/abstract=1126723> (last visited Feb. 6, 2009).

36. *Crane*, *supra* note 19, at 429.

37. Kobayashi, *supra* note 33, at 710-712. But see, *Bundles of Joy*, *supra* note 31, at 3-5 for the

"services,"⁴² "two-good,"⁴³ "multiple product,"⁴⁴ and "commodity."⁴⁵ To name a few not-always-consistently applied sub-definitions. The CFI has previously identified three separate bundling practices, "mixed bundling", "pure bundling," and "technical bundling"⁴⁶ and evaluated them using different criteria to determine whether or not the merged entity would have incentive to engage in them.⁴⁷ The applicant in *GE* argued that a distinction had to be drawn between different bundling practices and their different potentials for anticompetitive effects. The CFI clearly agreed that they were different business practices, each with their own market pressures when it separately evaluated the likelihood of their occurring in the proposed merger.⁴⁸ While *GE* did not reach the merits of the Commission's competitive foreclosure arguments,⁴⁹ it nonetheless evaluated the different forms of bundling in terms of the economic and competitive criteria necessary to demonstrate rationales for the merged entity to use them.

The presence of factors such as an exclusive IPR in one good or service, or other restrictions on a customer's ability to procure the goods separately, or pricing either above or below average variable cost, or restrictions to competition or entry, are areas where most competition questions have arisen.⁵⁰

dangers of all-inclusive definitions.

38. Kobayashi, *supra* note 33, at 710-712.

39. Cascade, 515 F.3d at 896, Timothy J. Brennan, *Bundled Rebates as Exclusion Rather Than Predation*, 4 J. COMPETITION L. & ECON. 335,342 (June 2008) [hereinafter "Bundled Rebates"].

40. See Commission Notice—Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (Text with EEA relevance) OJ C 101, 27/04/2004 p. 2 para. 219.

41. Bundles of Joy, *supra* note 31, at 6.

42. *Id.*

43. Kobayashi, *supra* note 33, at 713.

44. Department of Justice, Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act, at p. 100 (September 2008), available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>; John Thorne, DISCOUNTED BUNDLING BY DOMINANT FIRMS, 13 GMLR 339, 341 (Winter 2005).

45. Kobayashi, *supra* note 33, at 707.

46. See, e.g., *GE*, *Supra* note 31, at ¶¶ 417-426 (Pure bundling), ¶¶ 427-430 (Technical bundling) and ¶¶ 431-437 (Mixed bundling) (The *GE* Court held that each required a different type of examination:

It is also necessary to distinguish, as the applicant rightly states, between three distinct practices: pure bundling (where sales are tied by means of a purely commercial obligation to purchase two or more products as a bundle); technical bundling (where sales are tied by means of the technical integration of the products); and mixed bundling (where a number of products are sold as a package on more favourable terms than if the products are purchased separately). The Commission's analysis of each of those three types of bundling is considered under separate headings below. It is none the less appropriate to examine, first, certain practical limitations affecting the Commission's reasoning on bundling as a whole, and which emerge from the contested decision.

47. See *GE*, *supra* note 31, at ¶¶ 444-473.

48. Compare *GE*, *supra* note 31, at ¶¶ 367-369 (Applicant's assertion) with ¶ 406 quoted above.

49. *Id.* at 471.

50. Compare e.g., Cascade, 515 F.3d at 896-97 with *LePages's*, 324 F.3d at 154-57. (discussing

Mixed bundling

The practice of “mixed bundling” is one of the most pervasive marketing practices. It is usually defined as an undertaking offering a package of two or more goods or services in a fixed proportion as well as offering them for sale separately.⁵¹ There are as many permutations of this practice as the business mind can create. Anyone who has purchased a flashlight blister packed with batteries, seen “two for one” sales at the grocery store, or a collection of an artist’s greatest hits is familiar with them. The primary subdivisions of this form of bundling may be separated into two-product mixed bundling and multi-product mixed bundling.⁵² Multi-product mixed bundling can have many permutations because many different components or combinations of components may be offered separately.⁵³ These may be further subdivided into mixed bundling based purely upon price reductions⁵⁴ and mixed bundling based upon technical or consumer convenience. The latter form of mixed bundling is commonly encountered every time one purchases an automobile for which parts like tires or car radios are sold separately by the manufacturer or by others. As many in need of a flashlight have nocturnally discovered, a mixed bundle that includes batteries provides consumer benefits.

Pure bundling

The practice of “pure bundling” is one where the firm selling the bundle chooses to only sell the bundle and not the goods or service as a separate package.⁵⁵ In *Bundle and Tie*, Evans and Salinger examine the economics of selling foreign electrical adapters in packets which do not

bundled discounts and rebates).

51. See Kobayashi Survey, *supra* note 22, at 711; Bundle and Tie, *supra* note 28, at 54; Barry Nalebuff, *Bundling, Tying, and Portfolio Effects*, DTI ECON. PAPER NO. 1 at p. 14 (2003) (UK), available at <http://www.berr.gov.uk/files/file14774.pdf>. (last visited Feb. 6, 2009) [hereinafter “Nalebuff”].

52. See, e.g., Kobayashi Survey, *supra* note 22, at 714-727 (analyzing various economists’ theories on the effect of two-product and multi-product bundling).

53. See generally, Bundle and Tie, *supra* note 28 (examining mixed bundling models which include several types of mixed multi-product bundling in theoretical and empiric models in order to discover efficiencies and test their exclusionary effects).

54. See generally, Mixed Bundling, *supra* note 18. (examining bundled discounting with regard to the effects of profit sacrifice on exclusionary effects and consumer welfare). See also Thomas A. Lambert, *Evaluating Bundled Discounts*, 89 MINN. L. REV. 1688, 1669-1739 (2005) (examining approaches courts and commentators have taken for evaluating the tying effects of above-cost bundled discounts against their consumer benefits).

55. See Kobayashi Survey, *supra* note 22, at 711; Bundle and Tie, *supra* note 28, at 54; Nalebuff, *supra* note 51, at 13; GE, *supra* note 31, at ¶¶ 406, and 417-426 (discussing of likelihood of pure bundling...)

permit consumers to purchase them separately.⁵⁶

Technical bundling

Technical bundling is similar to pure bundling in that both goods are bound together by technical means such that they cannot be supplied as separate products. In the case of technical bundling the justifications may include both economic benefits as well as technical ones. In the case of "new economy" products, the components may, at an early stage of development be considered to comprise more than one product but, through time may be considered to become one integrated product.⁵⁷

C. SOME PROBLEMS IN DETERMINING WHAT IS BUNDLED OR TIED

Another issue complicating the area is determining exactly what items belong to a bundle. Bundling is so ubiquitous and takes so many forms that labels and definitions are easily applied in an inconsistent manner. One man's haircut is another man's bundle of services which include provision of scissors, rental of the shop, and floor cleaning services as well as the barber's services.⁵⁸ Does a restaurant menu offering its burgers only with fries provide a contractual tie or is the offer a pure bundle? Does a restaurant, which gives its diners no choice in portion size, stifle consumer choice? Do grocery stores, which sell eggs by the dozen, engage in package bundling? Then there is the case of package offers for the unlimited use of services such as packages of cable TV channels or telecommunications services?⁵⁹ Are these bundles of channels, tied services or should these definitions apply at all? Does the existence of a bundle or tie depend upon which elements of the transaction are selected and which are ignored?

These examples provide important reasons for clear definitions of the terms both by economists and legal professionals both to provide common understanding of the behavior being addressed and to avoid elastic tape measures whose measure depends upon the object's size or shape.

56. Bundle and Tie, *supra* note 28, at 71-75.

57. See *Caldera, Inc. v. Microsoft Corp.*, 72 F.Supp.2d 1295, 1304-05 (D. Utah 1999) (alleging that the technological integration of MS-DOS and Windows 3.1 into Windows 95 constituted a *per se* tying violation). See also *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C.Cir.1998) [hereinafter "Microsoft II"] as described by the Court of Appeals in *U.S. V. Microsoft Corporation*, 253 F.3d 34, 92, (D.C. Cir. 2001) [hereinafter "Microsoft III"] (concluding that technical integration of Windows with Graphic Interface had occurred for purposes of evaluation of consent decree required detailed inquiry to determine of technical integration for purposes of "antitrust question").

58. See, e.g., *Bundles of Joy*, *supra* note 31, at 6-7.

59. The above examples are drawn from *Bundles of Joy*. See *Bundles of Joy*, *supra* note 31, at 7-8.

Some Inconsistencies in Economists' Definitions of the Term 'Bundling'

The economic literature often divides bundling practices into a number of subdivisions. The relation of these subdivisions to tying effects and the varying degrees of countervailing efficiencies, consumer welfare and welfare distributing effects have been the subject of extensive theoretical and to a lesser extent empirical examination.

However, economists' uniformity of definition is a bit relative. . In the course of researching this article, I've encountered significant differences in how the terms bundling and tying have been related to each other. For example, Evans and Salinger equate "pure bundling" with tying.⁶⁰ This is inconsistent with the concept that a "tie" may also be a negative contractual obligation pursuant to which there is an agreement not to purchase a good from another source.

Nalebuff uses a curiously circular definition of bundling. First he defines "pure bundling" as a situation where "two goods, A and B are only sold together . . . in some fixed proportion. . ."⁶¹ He then goes on to state that "For most of our analysis the examples of pure bundling will be subsumed under the generalised category of mixed bundling. . ."⁶² Nalebuff's definition of mixed bundling comprises a situation where "the goods A and B are sold as an A-B package in addition to being sold individually."⁶³ However, this definition assumes that B will only be supplied by the owner of A. That factor can only be assured if the owner of A has an actual monopoly in good B. In the B monopoly case, there is no need for tying contracts or product bundling to assure sales of B. Nalebuff's definition also proves too much in that any individual purchases of "B" without "A" would be different transactions, distinct and independent from the coercion supplied by the tying contract. Whereas there is no contractual compulsion in mixed bundling. according to Nalebuff, then, one bundling definition conditioned upon goods never being sold separately is subsumed into the analysis of a practice expressly conditioned upon them being sold separately.

Judge Richard Posner⁶⁴ describes bundling as being analytically

60. See *Bundle and Tie*, *supra* note 28, at p.41:

"Tying is a special case of bundling in which consumers do not have the choice of buying the "tied" product without the "tying" product.". While the authors examine only the economic effects of various practices their identification of "pure bundling" with "tying" confuses any understanding of the differences between contractual tying and economic tying and the application of tests for anticompetitive effects.

61. Nalebuff, *supra* note 51, at 13.

62. *Id.* at p. 14.

63. *Id.* at 14-15.

64. While Judge Posner is technically not an economist, as one of the chief proponents of the Chicago School his economic analysis is viewed as authoritative.

similar to tying⁶⁵ and defines them as follows:

In bundling, the “tied” product is given away, which means that in effect the seller is paying the buyer to buy it. . . Bundling is the equivalent of offering a discount off the price of the tying product. But tying is the same. To induce the buyer to buy an unwanted extra . . . or a wanted extra at a supracompetitive price. . . the seller must offer a better deal on the tying product; he might even give it away.⁶⁶

This definition of bundling as a form of “giveaway” and tying as a better deal or a giveaway doesn’t comport with any of the other established definitions and appears to be an interpretation of George Stiglitz’s work on Block Booking, (termed by other economists as a specific subset of bundling).⁶⁷

It is not surprising that economists find it difficult to resist making broad, inclusive, definitions of such widespread and varied business practices. However, the more expansive the definition, the more difficult it is to use them to determine whether or not a practice is anticompetitive.

More muddled terminology

Others eschew such definitions, which are, in their view, too inclusive to provide meaningful analyses.⁶⁸ Leibowitz and Margolis make the point that imprecise definitions of bundling and tying create difficulties in applying economic analysis, especially when economists apply their models to the real-world situations of competition. The terminology in this field has been, in our opinion, getting muddled. We will use the term bundling to represent instances where fixed quantities of items are sold together. Pure bundling refers to circumstances goods are only sold in bundles and mixed bundling only occurs when a seller offers both bundles and stand-alone versions of one or both of the individual goods. The bundles can contain differentiated

65. POSNER, *supra* note 18, at 328.

66. *Id.*

67. *Id.* at n. 9 (citing GEORGE J. STIGLER, *A Note on Block Booking, The Organization of Industry* 165, 165 (1968)). Stigler’s work was a response to the leveraging theory under which the Supreme Court in *United States v. Loew’s*, 371 U.S. 38 (1962), and *United States v. Paramount Pictures, Inc.*, 344 U.S. 131 (1948), struck down the use of block sales. In these cases the owner of popular films was held to have forced buyers to take inferior films in a bundle. Stigler rejected the leverage theory but held that the practice could lead to higher profits by its use as a price discrimination mechanism. See also Kobayashi, *supra* note 22, at 715-23; Leibowitz & Margolis, *supra* note 30, at 17.

68. See, e.g., Bundles of Joy, *supra* note 31.

goods or undifferentiated goods.

Only where goods are used in fixed proportions (and if all the units in contained in a single bundle are consumed) are ties and bundles the same. Thus Microsoft's practice of including browsers or media players is not a tie-in because customers do often use more than one of these products with the operating system-one from Microsoft and one or more from other providers. Thus the practice imposes nothing like an "all requirements" constraint.

But there are other combinations of products that are neither ties nor standard bundles. Go into an all-you-can-eat buffet restaurant and what you are offered is neither a tie nor a fixed bundle.

Finally, the antithesis of a bundle is complete a-la-carte pricing. This is the case whereby consumers pay for the exact amount of each item they consume Bundling, by its nature is incompatible with a-la-carte pricing. There is nothing about tie-in sales; however, that precludes a-la-carte pricing.

Economists generally think about an a-la-carte world-our models of markets are of the a-la-carte variety.

But most markets do not function in this a-la-carte fashion . . . [D]eviations from this ideal do not imply inefficiency but instead merely that some costs are left out of our convenient textbook models.⁶⁹

Interestingly enough, Leibowitz and Margolis' own definition contains a contradiction. Terming situations where goods are sold in fixed proportions to be both a bundle and a tie creates confusion further on where they state that bundling is incompatible with a la carte pricing while tie-in sales are not. That would appear to distinguish the two practices.

I conclude that these errors are the result of efforts to define widespread and many-faceted practices using short, all-inclusive definitions. These definitions use the same terms to identify contractual commitments and the effects stemming from contractual commitments and

69. Bundles of Joy, *supra* note 31, at 3-5 (emphasis added).

are extended to cover non-contractual practices having similar, but not identical effects. These efforts appear to be economists' and lawyers' way of creating a-la-carte models to represent a smörgåsbord world. This is not to say, however, that identifying business practices by using these terms is a completely meaningless exercise. Rather, it highlights the necessity to clearly identify and separate business practices from the competition law tools with which they are examined. It also warns us against overly formalistic "off the shelf" approaches to testing effects on competition when the thing being measured, and how such measurement should be applied is not all that clear.

II. A QUICK PRIMER IN LAW AND ECONOMICS APPROACHES TO TYING, EXCLUSION, AND SECONDARY MARKET LEVERAGE

Originally, in line with its creation as a patent law doctrine, antitrust law in the U.S. was hostile to all forms of tying.⁷⁰ Later, the Chicago School argued that tying was procompetitive because a monopolist in market A would not be able to leverage its monopoly in A to obtain monopoly profits in market B since there was only a "single monopoly profit" in the package such that the monopolist had "neither the incentive nor the ability to leverage its monopoly into another market."⁷¹ The Chicago School also argued that a monopolist would typically prefer competition in the complements market as lower complement prices would increase demand for the monopoly good.⁷² Later, a number of economists (Neo-Chicago School) questioned this because the argument "lacked completeness" and came up with theories in which monopolists using various bundling and tying practices could affect market structure in secondary markets to deter market entry.⁷³ These leveraging theories were typified by the work of Michael D. Whinston, Jose Carbajo *et al.*, Barry Nalebuff, Jay P. Choi, and Nicholas Economides (as cited by Giotakos in

70. *Standard Oil*, 337 U.S. at 305-306 ("Tying arrangements serve hardly any purpose beyond the suppression of competition.").

71. Evans & Salinger, *supra* note 21 at 39-40 (citing BORK, *supra* note 1 at pp. 371-381). See also Nicholas Economides & William N. Herbert Patents and Antitrust: Application to Adjacent Markets 11, (March, 2008) (unpublished abstract), available at <http://ssrn.com/abstract=1013226> (last visited Mar. 13, 2009) (citing Aaron Director and Edward H. Levi, *Law and the Future: Trade Regulation*, 51 Nw. U. L. REV. 281,290 (1956)).

72. See, e.g., Timothy J. Brennan, *BUNDLED REBATES AS EXCLUSION RATHER THAN PREDATION*, 4 J. COMPETITION L. & ECON. 335,342 (June 2008) [hereinafter "Bundled Rebates"].

73. Dimitri Giotakos, *GE/Honeywell: A Theoretic Bundle Assessing Conglomerate Mergers Across The Atlantic*, 23 U. PA. J. INT'L ECON. L. 469, 487-90 (Fall 2002) [hereinafter "Theoretic Bundle"].]

Theoretic Bundle).⁷⁴ Still later, in the post *LePage*'s period, a different group of economists tested the assumptions of these Neo-Chicagoists (the "Post-Neo Chicago School")⁷⁵ and found them wanting.

A. DOES BUNDLING EXERT EXCLUSIONARY EFFECTS ON SAME AND SECONDARY PRODUCT MARKETS?

The most difficult area in the case-law and the economic literature has been if, when, and how, anticompetitive exclusion may be exerted by dominant firms using forms of bundling practices in one good or service on competition in same or different markets.

This competition aspect of tying effects has drawn the most attention from the courts and commentators. Even to the point of the United States of America as *Amicus Curiae* recommending that the U.S. Supreme Court deny *certiorari* in *LePage*'s because:

There is insufficient experience with bundled discounts to this point to make a firm judgment about the relative prevalence of exclusionary versus procompetitive bundled discounts. Relative to the practice of predatory pricing analyzed in *Brooke Group*, there is less knowledge on which to assess whether, or to what extent, the legal approach to a monopolist's allegedly exclusionary bundled discounts should be driven by a strong concern for false positives and low risk of false negatives. Further empirical development may shed light on that question. Further experience may also shed light on whether certain aspects of bundled discounts—e.g., the exact nature of the discounting mechanism or the presence or absence of increases in pre-discount prices—may be indicative of an enhanced likelihood that a particular bundled discount program is pro- or anticompetitive.

In light of all of these concerns, the United States submits that the better course at this time is to defer plenary review of the question whether to extend "the essential *Brooke Group* bright-line rule" (Pet. 22) to bundled rebates. . . .

74. Theoretic Bundle, *supra* note 73, at 488-91. See also Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837, 855-56 (1990).

75. Professor Crane gave them slightly differently names in his review of HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST, (Robert Pitofsky ed., Oxford University Press 2008). See Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. Chi. L. Rev. (forthcoming 2009), available at <http://ssrn.com/abstract=1375026> (last visited May 17, 2009). "Chicago, Chicago. That toddlin' town. . . Chicago, Chicago. The town that Billy Sunday couldn't shut down." FRED FISHER, *Chicago* (1922).

While the considerations that motivated this Court's decision in *Brooke Group* may, upon further study, provide useful guidance in resolving the proper treatment of bundled rebates, the applicability of the *Brooke Group* approach to this business practice would benefit from further judicial and scholarly analysis⁷⁶

Since that time, various studies, papers, and U.S. courts have wrestled with the problem of bundling and exclusion. There appears to be a consensus in the U.S. that bundling exclusion may occur under special circumstances and only in secondary markets.⁷⁷ However, as *Cascade* and *LePage* suggest, there is no consensus on a test that works well to distinguish exclusion from normal competition. The theory that monopolists using tie-in sales can leverage a monopoly in good A into a monopoly in good B is now rejected by most economists.⁷⁸ That is due to the fact that price cuts in monopoly good A in order to obtain a monopoly in good B are both an inefficient loss of monopoly profits in A and unnecessary. This is because the same price cuts in good B matching all consumers' reserve price would accomplish the same result without running into competition law concerns, and without cutting into monopoly profits for good A.⁷⁹

The CFI reached a similar conclusion in *GE* that the "Cournot Effect"⁸⁰ of itself does not provide incentives for mixed multi-product

76. See Brief for the United States as Amici Curiae, 3M v. LePage's Inc., 2004 WL 1205191 at 14-15 (U.S. May 28, 2004) [hereinafter *LePage's*] (Footnotes omitted). In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the U.S. Supreme Court explains that "cutting prices in order to increase business is the very essence of competition" and that the potential for "mistaken inferences" of exclusionary conduct may "chill the very conduct the antitrust laws are designed to protect." See *Lambert*, *supra* note 53, at 1701 (quoting *Matsushita Elec. Indus. Co.*, 475 U.S. at 594).

77. See *Bundles of Joy*, *supra* note 31, at 11 ("Market foreclosure is essentially the last man standing as an economic defense of antitrust provisions against tie-in sales."). See also Alan Devlin, *A Neo-Chicago Perspective on the Law of Product Tying*, 44 AM. BUS. L.J. 521, 532-33 (Fall 2007) ("[L]everage is a specious and vacant concept that serves only to confuse and mislead, rather than to clarify.").

78. See, e.g., Devlin, *supra* note 76, at 548-49; *Bundles of Joy*, *supra* note 31, at 9; Kobayashi, *supra* note 50, at 84-85; Timothy J. Muris, Vernon L. Smith, *Antitrust and Bundled Discounts: An Experimental Analysis*, 75 ANTITRUST L. J. 399, 418-421 (2008) [hereinafter *Experimental Analysis*]. These refer to the line of monopoly leveraging theories beginning with Whinston, Choi and Nalebuff.

79. See Kobayashi, *supra* note 22, at 9; Crane, *supra* note 19, at 449-59 (explaining that profit sacrifice theory doesn't work and applying complex economic theories involving numerous and interdependent dynamic facts in a fluid litigation too difficult). See also Kobayashi, *supra* note 22, at 735-36 (showing that entry deterrence theories shown to be sensitive to specific model assumptions).

80. Augustin Cournot, RESEARCHES INTO THE MATHEMATICAL PRINCIPLES OF THE THEORY OF WEALTH 103 (Nathaniel T. Bacon trans., MacMillan Co. 1927) (1838) ("Cournot"). See also Commission Decision (EC) No. 2004/134 of 3 July 2001 (declaring a concentration to be incompatible with the common market and the EEA Agreement) (Case COMP/M.2220, General Electric/Honeywell, 2004 O.J. (L 48) 1 note 374-376).

"The Cournot effect is an economic theory dealing, in substance, with the advantages

bundling since there would be no interest in sacrificing profits on one set of goods by granting discounts in order to promote profits for another set of goods.⁸¹ The Commission had argued that the merged entity would have had the economic incentive to engage in mixed bundling.⁸² One of *Cournot's* conclusions was that consumers are better off when all complementary products are produced and marketed by a single firm.⁸³ In *GE*, the Commission in essence, argued that it was more efficient for the merged entity to engage in bundling and, therefore, bundling behavior was probable.

The U.S. Supreme Court's recent *Linkline* decision⁸⁴ provides another insight into the practicalities of pursuing such matters. The issue in *Linkline* was whether a regulated, vertically integrated company was engaging in "predatory pricing" when pricing wholesale access to competitors at a rate which enabled the company's retail pricing to cut into the competitor's margin for a competing retail service.⁸⁵ The *Linkline* Court was clearly aware that it was dealing with a two-market, exclusion claim (identical to the market exclusion theory of the Commission Decision and *CFI Judgment*) and declined to adopt it.⁸⁶ The *Linkline* Court found that determining a "fair price"⁸⁷ and the cost of policing it was neither an efficient use of court time nor would it provide useful guidance to

which a firm that sells a wide range of products, in contrast to its competitors whose range is more restricted, may derive from the fact that, if it offers discounts on all the products in the range, thereby reducing its profit margin on each, it none the less benefits overall from that practice because it sells a larger quantity of all the products in its range."

GE at note 450.

81. See GE, *supra* note 31, at notes 456-62.

82. See GE, *supra* note 31, at 436 (citing recitals 374-376 of the Commission Decision.).

83. Damien Geradin, Anne Layne-Farrar, A. Jorge Padilla, *The Complements Problem Within Standard Setting: Assessing The Evidence on Royalty Stacking*, 14 B.U. J. SCI. & TECH. L. 144, 145-6 (Summer 2008).

84. Pac. Bell Tel. Co. v. LinkLine Communs., Inc., 129 S.Ct. 1109. [hereinafter "LinkLine"].

85. Linkline, 129 S. Ct. at 1118.

86. *Id.* at 1122.

Amici assert that there are circumstances in which price squeezes may harm competition. For example, they assert that price squeezes may raise entry barriers that fortify the upstream monopolist's position; they also contend that price squeezes may impair nonprice competition and innovation in the downstream market by driving independent firms out of business. . . . The problem, however, is that amici have not identified any independent competitive harm caused by price squeezes above and beyond the harm that would result from a duty-to-deal violation at the wholesale level or predatory pricing at the retail level.

87. Linkline, 129 S. Ct. at 1120 n 3.

Indeed, in footnote 3, the Court limited any interpretation of the seminal case of *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) which could require an upstream monopolist to price inputs such that a downstream competitor could obtain a "fair price". "Given developments in economic theory and antitrust jurisprudence since *Alcoa*, we find our recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before us."

undertakings.⁸⁸ "Recognizing price-squeeze claims would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed. And courts would be aiming at a moving target, since it is the *interaction* between these two prices that may result in a squeeze."⁸⁹ What remains in the economic literature, are concerns regarding exclusionary effects on secondary markets.

Post-Neo Chicago School economists found that though secondary market exclusion was theoretically possible, Neo-Chicago School theories required complex assumptions, which do not normally occur (such as conditions of actual, as opposed to near monopoly).⁹⁰ One of the other problems with theories of exclusion is that they tend to ignore bundling's short run increases in net social welfare⁹¹ and long run increases in social welfare.⁹² The Neo Chicago School of exclusion also appears to ignore the basic incompatibility between social welfare maximization and consumer surplus in markets with network effects⁹³ which exclusion appears to distort some of their findings.

B. THE HISTORY OF LEVERAGING EFFECTS THEORIES DEMONSTRATES THAT COMPETITION LAW SHOULD APPROACH THEM WITH CAUTION

An important lesson, which may be drawn from the history of these economic theories, is that competition authorities should be careful about how far they draw inferences based upon economic analyses of practices termed bundling and tying. One may be glib and say that the Chicago

88. *Id.* at 1121.

One interesting and potentially relevant difference between the United States and European system is that in the EU, DG Competition is both a regulatory agency as well as one conducting adversarial proceedings. It thus far has not asserted competence for price controls. However, the Community may decide that is appropriate for DG Competition to involve itself in the sort of pricing issues that Linkline held were not a judicial function.

89. *Id.*

90. Bundles of Joy, *supra* note 31, at 12 ("Everything has to be just right to provide a reason for tying [as a market foreclosure device.]"); *See also* Kobayashi, *supra* note 33, at 745; *Neo-Chicago Perspective* at 567

("First, actual monopoly on the part of the tying firm is a *sine qua non* for consumer harm. Where a tying firm is dominant, but not a monopolist, no tie-in should be held illegal. In other words, where a tying firm does not have a monopoly in the tying market, tie-ins should enjoy *per se* legality.");

Brennan, *supra* note 38, at 352

"The key idea is that exclusion cases typically rest on the cornering of a new market. This is omitted when the firms who buy a bundle and obtain the discount or rebate are treated as if they are final customers rather than competing complement providers. . . . However, when the firms compete, their interests diverge from those of their customers.")

91. Crane, *supra* note 19, at 461–62.

92. Kobayashi, *supra* note 33, at 735–37.

93. Irina Suleymanova, Christian Wey, *On the (Mis-) Alignment of Consumer and Social Welfare in Markets with Network Effects*, Deutsches Institut für Wirtschaftsforschung, Discussion Paper 794, (May 2008), available at: <http://ssrn.com/abstract=1135663> (last visited Mar. 16, 2009).

School was right all along⁹⁴ but this is not strictly true. The Neo Chicago School did demonstrate that some of the Chicago School's postulates were overstated.⁹⁵ The Post Neo Chicago School, however, demonstrated that the Neo Chicago School's inferences regarding exclusion and secondary market deterrence were not viable regarding same market exclusion were confined to narrow instances of market deterrence, and likewise overstated.⁹⁶ Liebowitz and Margolis refer to market foreclosure theories of tying or bundling as "a Goldilocks theory of tie-in sales" in which "[E]verything has to be just right for the model to provide a reason for tying."⁹⁷ The best one can say of market exclusion is that a competition authority should demonstrate greater caution the more their real world situation differs from the specific theoretic assumption of the bundling theory it seeks to apply. There is also heightened concern when economic theories developed for static economic analysis is applied in an innovation industry, which often requires a more dynamic long-term economic analysis.

Extensive experience with mandatory unbundling in the telecommunications industry gives a convincing demonstration that the anticipated market entry and investment in innovation in unbundled networks has not, as theorized, occurred in the five countries trying it.⁹⁸ Mandatory unbundling in telecommunications provides a real world test of the effectiveness of antibundling policies regarding market exclusion, especially where network effects are a significant consideration.⁹⁹ Hausman & Sidak show that none of the rationales for unbundling have

94. See *Bundles of Joy*, *supra* note 31, at 12-14 (noting that Whinston's quotation of Posner regarding tying effects left out Posner's acknowledgment that leveraging exclusion could occur but that it was just not likely).

95. Devlin, *supra* note 23, at 548-49

"The classic Chicago School found tying arrangements inherently benign. This position is unconvincing and four situations will be highlighted in which consumer harm may flow from a tie. These are: instances of regulation, efficiency asymmetry, barriers to entry, and certain new economy industry settings. *A ubiquitous feature in all of these situations will be extreme assumptions, unlikely to be met in real life.*"

(Footnote omitted, emphasis added.)

96. See, e.g., *Bundles of Joy*, *supra* note 31, at 10-11 ("Before getting started, we take note of one theory of tie-in sales that is no longer accepted by economists, what is now commonly called leverage.").

97. *Bundles of Joy*, *supra* note 31, at 11-12. See also Christopher S. Yoo, *Network Neutrality, Consumers, and Innovation*, 2008 U. CHI. LEGAL F. 179, 255. "Simply put, everything must be just right for anticompetitive effects that Whinston identified to arise. As such, it is a classic example of exemplifying theory." But see, Barry Nalebuff, *Bundling as a Way to Leverage Monopoly*, Yale School of Management Working Paper ES Economics No. 36, (Jan 2004) (arguing that a Monopolist can leverage a monopoly in good A to achieve market power in good B.), available at <http://ssrn.com/abstract=586648> (last visited May 13, 2009).

98. See, e.g., Jerry A. Hausman, J. Gregory Sidak, *Did Mandatory Unbundling achieve its purpose? Empirical Evidence From Five Countries*, 1 J. COMPETITION L. & ECON. 173 (March 2005) [hereinafter "Hausman & Sidak"].

99. *Bundles of Joy*, *supra* note 31, at 36-37.

been supported in practice. These reasons include fostering retail competition, reducing entry barriers, providing support for competing networks or strengthening wholesale competition.¹⁰⁰ This lack of increased competition, in combination with the less than blazing sales success of the WMP-less Windows N operating systems demonstrate that Regulatory agencies should use a light touch when applying exclusionary theories.¹⁰¹

C. THE KOBAYASHI SURVEY FOUND THAT MOST EXCLUSIONARY THEORIES OF BUNDLING CONTAIN RESTRICTIVE ASSUMPTIONS AND SOME DO NOT CONSIDER WELFARE EFFECTS

In a 2005 response to the concerns of the United States expressed regarding granting certiorari in *LePage's*, Professor Kobayashi performed a review of the economic literature on commodity bundling.¹⁰² He found that most of the literature on the subject was theoretical and that the models which found leveraging on secondary markets contained restrictive assumptions which seldom, if ever, existed in real markets. Professor Kobayashi found that economic literature on bundling almost exclusively examined two good, two firm markets where the degree of competition is limited in one or both markets, and focusing on theoretical settings where one firm has an actual monopoly.¹⁰³ He also found that "the vast majority of the papers suppress the large and varied reasons why bundling is used" such as to induce self-selection, or to take advantage of economies of scale, scope, or other efficiencies.¹⁰⁴ Of special significance is Kobayashi's analysis of bundling as entry deterrence. Kobayashi analyzed economist's theories on single and multi-product situations in which a monopolist (as opposed to a *near* monopolist) in A faced limited, actual or potential competition and found that there is entry deterrence only in limited circumstances where other entry deterrent strategies would not raise antitrust concerns.¹⁰⁵ Kobayashi found that most of the bundling analyses were on the theoretical side and relied upon restrictive assumptions to work

100. Hausman & Sidak, *supra* note 97, at 245; Bundles of Joy, *supra* note 31, at 37.

101. The Commission's theory that Microsoft's "bundling" of WMP with its operating systems excluded entry into the media player market and leveraged its position on the adjacent work server market to the disadvantage of companies selling other work server operating systems. The Commission's theory appears to be less than prescient with only 1787 copies of the WMP-less XP OS sold between June 2005 and April 2006 (or .005%) and Microsoft's share of the work server market continuing to grow. Fact Sheet, Windows XP N Sales, *available at* <http://www.microsoft.com/presspass/legal/european/04-24-06windowsxpnsalesfs.mspx> (last visited Feb. 10, 2009), and the Windows server market share continued to grow against other x86 server operating systems. IDC Press Release, May 27, 2008, *available at* <http://www.idc.com/getdoc.jsp?containerId=prUS21255808> (last visited Feb. 10, 2009).

102. Kobayashi, *supra* note 33, at 709, 712 (listing the primary papers reviewed in Table 2).

103. *Id.* at 712.

104. *Id.* at 714.

105. *Id.* at 733-41.

such as the degree of competition and the way in which the firms interact. He also found that little attention had been paid to generating testable hypotheses and carrying out empirical tests.¹⁰⁶

D. RECENT EXPERIMENTS DUPLICATING ASSUMPTIONS FROM THEORIES OF EXCLUSIONARY BUNDLING DO NOT SUPPORT SUCH EFFECT IN REAL WORLD SCENARIOS

Recently, Professors Timothy Muris (a former head of the Federal Trade Commission) and Vernon Smith performed the type of empirical experimental analyses of bundling suggested by Kobayashi.¹⁰⁷ Professors Muris and Smith subjected a number of exclusionary bundling theories to “robustness checks” in a series of experiments performed by a research team at the Interdisciplinary Center for Economic Sciences at George Mason University.¹⁰⁸ These experiments were designed to evaluate dynamic anticompetitive strategies and the effect of bundling on long-run consumer and total welfare.¹⁰⁹ The Experimental Analysis *inter alia*, concluded:

As we have shown, the experimental results reported in this article lend no support to the critics of bundling. Even in a controlled setting that incorporates the critical assumptions of the theoretical models that predict the existence of anticompetitive harm, bundling generally increases both total and consumer welfare. These results cast doubt upon whether “decent theoretical reasons for concern” exist, and suggest that the sound reasons for a cautious approach to Section 2 [of the Sherman Act] apply a fortiori to bundling.¹¹⁰

The Experimental Analysis found that effects predicted by these exclusion theories were less likely to occur in mixed bundling than in pure bundling situations. For example, under situations which matched theoretical criteria asserted to create exclusion, test results did not lead to exclusion in the secondary market.¹¹¹ Even where test criteria were altered to increase a monopolist’s incentive to act anticompetitively by creating less elastic demand curves and reducing the monopolist’s fixed costs in the secondary market the results the presence of a fringe competitor with only 8% of the monopolists capacity in the secondary market prevented market

106. *Id.* at 745.

107. Experimental Analysis, *supra* note 77, at 399.

108. Experimental Analysis, *supra* note 77, at 402.

109. *Id.* at 403.

110. *Id.* at 432.

111. *Id.* at 416-18.

exclusion.¹¹² An even more restrictive set of criteria was used to simulate situation with a competitor with only 5% of the monopolist's capacity in the secondary market and the removal of entry and exit frictions from the model. In that case, however, both consumer and general welfare was increased.¹¹³

This led Murtis and Smith to conclude:

As we have shown, the experimental results reported in this article lend no support to the critics of bundling. Even in a controlled setting that incorporates the critical assumptions of the theoretical models that predict the existence of anticompetitive harm, bundling generally increases both total and consumer welfare. These results cast doubt upon whether "decent theoretical reasons for concern" exist, and suggest that the sound reasons for a cautious approach to Section 2 apply a fortiori to bundling.¹¹⁴

A comparison of these different exclusionary arguments highlights the fact that different bundling practices have greater or lesser *potential* for distortive effects in different markets. One can conclude that until there is a workable definition (or definitions) of exclusionary effects which do not "throw the baby out with the bath water," exclusion should be more the concern of competition theory than regulatory practice. If, however, the potential for distortive effects caused by bundling or tying is deemed great enough to require corrective measures an initial triage of bundling and tying practices will best direct the application resources to those bundling or tying practices deemed to present the strongest challenges to competition.

E. SOME PROCOMPETITIVE OR NEUTRAL REASONS WHY BUNDLES BUNDLE OR TIE

These recent examinations of the uses of bundling and tying practices have identified a number of procompetitive, or at least competition neutral reasons for the practices. For example, in *Cascade* the Ninth Circuit listed many procompetitive aspects of bundled discounts recognizing that they "generally benefit buyers because the discounts allow the buyer to get more for less" and "can also result in savings to the seller because it usually costs a firm less to sell multiple products to one customer at the same time than it does to sell the products individually."¹¹⁵ The Court also quoted the D.C. Circuit's observation in its *Microsoft* case that "[b]undling obviously saves

112. *Id.* at 421-22.

113. *Id.* at 422.

114. Experimental Analysis, *supra* note 77, at 432.

115. *Cascade Health Solutions*, 515 F.3d at 895-96.

distribution and consumer transaction costs”¹¹⁶ and noted that many academics had demonstrated that bundled discounts can create economies of scope and transaction costs, instill customer loyalty, lower net prices to consumers by eliminating multiple monopoly-price markups on complementary goods, and price discrimination. The Court also pointed out that the *Antitrust Modernization Commission’s, Report and Recommendations* 95 suggested that sellers use bundled discounts to increase demand in lieu of advertising, encourage use of a new product, or enter a new market. Finally it noted that the Supreme Court in one of its seminal tying cases had recognized that “[b]uyers often find package sales attractive; a seller’s decision to offer such packages can merely be an attempt to compete effectively—conduct that is entirely consistent with the Sherman Act.”¹¹⁷ It is important to note that *Jefferson Parish* a tying case focused on procompetitive efficiencies found in tying, and that this did not extend to cases of bundling in non-tied markets.¹¹⁸

Academics have argued that bundling and tying have other procompetitive aspects which should give pause to those inalterably opposed to the practices. Crane for example points out bundling’s elimination of “double marginalization”—the reduced sales that result from monopoly mark-ups on two or more complementary products.¹¹⁹ In that regard Crane points to one of the objections of the European Commission in *GE* (dismissed by the CFI) to the effect that the attraction of combining complimentary monopoly products of two entities might eliminate some of the inefficiencies of monopoly pricing which would inevitably result in bundling.¹²⁰ Dealing with consumer psychology is another example of hard to prove rationales for producers to bundle goods, examples being

116. *Id.* at 897 (quoting *U.S.v. Microsoft Corp*, 253 F.3d 34, 87 (D.C.Cir.2001) (*per curiam*)).

117. See *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 12.

118. The ECJ has similarly pointed to the advantages of a tying contract with reference to Art. 85(1) in *Case C-234/89 Stergios Delimitis v Henninger Brau AG.*, 1991 E.C.R. I-00935 (“*Delimitis*”) ¶¶ 10-12 (“Under the terms of [tied] beer supply agreements, the supplier generally affords the reseller certain economic and financial benefits, . . .”).

119. Crane, *supra* note 19, at 434-36. As Crane states in Fn 46, his theory is based upon Cournot. The CFI in *GE* held that the Commission’s mere citation to the Cournot theory without a detailed economic analysis was insufficient to demonstrate that exclusionary bundling would probably occur. *GE*, *supra* note 31, at 462.

120. Crane, *supra* note 19, at 434-36.

“[W]here it does occur, the elimination of double marginalization is a desirable efficiency because it is generally output enhancing. Double marginalization is a concern not only when the complementary products are each subject to monopoly power but also when they are subject to imperfect competition, which is characteristic of most markets. Where successful, use of mixed bundling to avoid double marginalization enhances consumer and social welfare by lowering the net price consumers pay for complementary products.”

(Footnote omitted.) (Crane also points out that Professor Barry Nalebuff, an expert in the *GE* case had denied that this effect could occur given that market’s characteristics. Crane, *supra* note 19, at 436 (citing, Barry J. Nalebuff, *Bundling and the GE-Honeywell Merger* 8, *YALE SCH. OF MGMT., Working Paper Series ES*, No. 22, (2002)), available at <http://ssrn.com/abstract=327380>).

simplifying a consumer's evaluation tasks by associating one known good with another less well known good.¹²¹ Bundling may also aid in sales where a bundle may satisfy differing priorities or needs within an organization.¹²²

One of the most important reasons for bundling is responding to consumer requests for discounts.¹²³ Indeed, it is often the buyer, rather than the seller who proposes multiple product bundling in return for a discount.¹²⁴ This monopsodic rationale was ignored by both the Commission and the CFI in *Microsoft* which, while using OEM's as proxies for consumers made no effort to consider whether there had been any pressure from OEM's, (some of whom command very high market shares) either to bundle or to unbundle Windows Media Player.¹²⁵ In contrast, *GE* specifically recognizes the potential for customer pressure to resist the imposition of bundling practices.¹²⁶

Evans and Salinger, in a seminal article examining the economics of why firms bundle and tie point out "[T]he empirical evidence . . . cautions against imposing too heavy a burden on defendants to establish efficiencies. We have seen that even in competitive industries where we are confident that efficiencies are the only plausible explanation for the practice, solid empirical evidence is not easy to produce."¹²⁷

These few examples of procompetitive rationales for bundling and tying help explain why all-encompassing definitions and Procrustean¹²⁸

121. Crane, *supra* note 19, at 436

"[S]ometimes a mixed bundling strategy may be explicable as an effort to simplify the customer's evaluation task by inducing the customer to anchor its evaluation of the overall package on one or two salient items in the package." There is an (I hope apocryphal) story in my family regarding a distant relative who increased his sales by advertising "8 cents each, three for a quarter!"

122. *Id.* at 440. "[A] diversified firm may choose to spread contingent discounts over a wide product portfolio in order to draw support for a package purchase from multiple product managers of the buyer, which may be induced to accept the package even if this results in a net price increase."

123. *Id.* at 441. "[M]any instances of bundled discounting are initiated by buyers rather than sellers. In particular, large-volume buyers often use their buying leverage across multiple product lines to secure discounts from sellers."

124. Richard M. Steuer, *Bundles of Joy*, 22 SPG ANTITRUST 25, 26 (Spring 2008) (citing, Richard M. Steuer, *Customer-Instigated Exclusive Dealing*, 68 ANTITRUST L.J. 239 (2000).)

125. Bundled Rebates, *supra* note 71, at 352. ("[F]or these end-user analyses to apply to bundled rebates, complement good suppliers, for example, retailers or distributors, have to be proxies for the end users that they ultimately serve . . . However, when the firms compete, their interests diverge from those of their customers.").

126. *GE*, *supra* note 31, at 422 (pure bundling) and 432 (mixed bundling).

127. Bundle and Tie, *supra* note 28, at 85-86.

128. Procrustes was one of the first "one size fits all" entrepreneurs who alternatively stretched his height-challenged guests, or cut off limbs from height-endowed guests in order to fit the dimensions of his iron bed. See LIVES OF PLUTARCH, LIVES VOL. I., translated by Bernadotte Perrin, Harvard University Press. (1914) (Theseus, the Athenian Adventurer applied structural divestment sanctions and ended Procrustes' dominant undertaking.). *Id.*

rules concerning these practices do not serve competition or promote social or general welfare.

III. THE COURT OF FIRST INSTANCES' CONFLATION OF THE TERM "ABUSIVE BUNDLING" WITH "ABUSIVE TYING"

The problems associated with the broad application of exclusionary theories of bundling are highlighted by the inability of broadly defined definitions to identify problems with the theories as exemplified by the *CFI Judgment*.

A. COURT OF FIRST INSTANCE DECISION

The European Commission ruled that Microsoft Corporation infringed Article 82 EC by: (1) not living up to its "special responsibility" to provide "interoperability information" for its desktop operating system to competitors so that they could compete in the server operating system market and (2) bundling Windows Media Player with the desktop operating system which, the Commission ruled, foreclosed entry into the media player market.¹²⁹ The Court of First Instance sustained the Commission's findings while annulling, as *ultra vires*, part of the Commission's order with respect to the setting up of a remedial mechanism.¹³⁰ The *CFI Judgment* Coins the Offenses of "abusive bundling and "abusive tying" in paragraphs 839 through 859.

Microsoft complained that the Commission mischaracterized its technical bundling of WMP with its Operating system as a tie because the bundling created tying effects in a secondary market. The CFI examined this assertion.¹³¹ In performing its analysis the CFI assumed that the commercial practice of bundling is the same as the practice of tying and applied an identical test. This conflation changed the presumptions and defenses attributable to bundling products to those used to balance the effects of tying products. In effect, the Commission finding that bundling (as an *ex ante* practice) created a tie is measured by the CFI using the *ex post* examination of the Commission's finding of tying. This is made manifest by the *CFI Judgment's* recitals.¹³² Paragraph 849 of the *CFI Judgment* refers to the elements in Commission Decision recital 831 asserted by the Commission to demonstrate its reasons for concluding that

129. Commission Decision of 24.3.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3.37.792 Microsoft) (the "Commission Decision").

130. See *CFI Judgment*, *supra* note 2.

131. *CFI Judgment*, *supra* note 2, at 839-42.

132. *CFI Judgment*, *supra* note 2 at 849-57 (emphasis added).

Microsoft's actions (bundling in the Commission Decision) created a "tie."¹³³ (The CFI terms this a "finding of abusive tying", a phrase not used by the Commission). While the CFI dismisses the difference as one of "semantics" the distinction has consequences for proof of objective justification.¹³⁴ In holding that the identification of either tying or bundling practices makes it impossible to present an objective justification defense the *CFI Judgment* denies an objective justification defense to a wide variety of normal business practices.¹³⁵

B. THE CFI'S CONFLATION OF THE BUSINESS PRACTICES OF BUNDLING AND THE EFFECT OF TYING IS MANIFESTED IN ITS CREATION OF THE TERMS 'ABUSIVE BUNDLING' AND 'ABUSIVE TYING'

The *CFI Judgment* uses these as interchangeable legal conclusions. However, an examination of the Commission Decision demonstrates that it used neither term while the *CFI Judgment* uses the term "abusive bundling" 9 times and the term "abusive tying" 28 times.¹³⁶ (often in the same paragraph) Paragraph 859 of the *CFI Judgment* is the clearest demonstration of the problem. It first refers to the Commission's finding as both bundling and tying and then states that the Commission's treatment of justifying factors "can be deduced both from the very concept of bundling and from the case-law" The three cases cited for this apparently self-evident conclusion are both *Hilti* decisions¹³⁷ and *Tetra-Pak II*.¹³⁸ None of these cases even mentions the words "bundle" or bundling. The *Hilti* case, however, bears greater resemblance to a patent misuse/tying case than it does to a bundling/tying case as most of the offenses were related to *Hilti*'s attempts to tie its patented nail gun to the purchase and use of unpatented nail strips including refusals to license its patented

133. *CFI Judgment*, *supra* note 2 at 831-32.

"The question whether there is foreclosure of competition because customers or suppliers of complementary software and content *are likely to use* the bundled product at the expense of competing non-bundled products is of course relevant. It will be shown in the following section (recital (835) *et seq.*) that the harmful effects on consumers from tying WMP (also) derive from undermining the structure of competition in media players which is liable to result in deterrence of innovation and the eventual reduction in choice of competing media players.

(Emphasis in original.)

134. *Id.* at ¶¶ 858-859.

135. Case T-201/04, *Microsoft Corp. v. Comm'n of European Communities*, 2007 E.C.R. II-03601 ¶ 62. *See, e.g.*, Reissued Guidance *supra* note 6, at 62.

136. *Id.* at ¶¶ 840, 841, 866, 941, 973, 976, 1058, 1167 and 1232 (Abusive Bundling). *Id.* at ¶ 49, 841, 842, 846, 848, 849, 859, 862, 868, 870, 918, 954, 989, 1031, 1035, 1168, 1194, 1261, 1284, 1288, 1334, 1340, 1341, 1356, 1357, and 1362 (Abusive Tying).

137. *Hilti*, *supra* note 13, at ¶ 8.

138. Case C-333/94 P, *Tetra Pak International SA v Comm'n of the European Communities*, 1996 E.C.R. I-05951.

products.¹³⁹

Accordingly, the *CFI Judgment* applies the same rationale to packaging as it does to coercive use of patents or contract terms. The CFI again confuses the terms when it analyses the Commission's description of lack of "customer" choice:

In the first place, when the Commission states that it is necessary to examine whether the dominant undertaking 'does not give customers a choice to obtain the tying product without the tied product', it is merely expressing in different words the concept that bundling assumes that consumers are compelled, directly or indirectly, to accept 'supplementary obligations', such as those referred to in Article 82(d) EC.¹⁴⁰

Going back to the wording of both Article 81 and Article 82 it should be noted that the specific reference are to "contracts subject to acceptance by the other parties of supplementary obligations. . ."¹⁴¹ rather than the more broadly interpreted term "agreements."¹⁴² It may thus be reasonable to infer that originally the Treaty Clause was drafted with contractual tying arrangements in mind and that effects from non-contractual bundling were to be judged separately from the connotative effects of the term "tying." The CFI relied upon its conflation of bundling with tying in order to find that the indirect effect of Microsoft's contracts with OEM producers on consumer choice were "supplementary obligations . . . subject to acceptance by the other party . . ."¹⁴³ In paragraphs 960-965, the *CFI Judgment* negates any requirement of privity, by holding that the conduct (technical bundling) resulted in consumers indirectly not being able to obtain the Windows Operating System without obtaining the Windows Media Player.¹⁴⁴

The CFI then reasoned that in consequence of the "impugned conduct" (bundling) which results in the offer of only one product, "it is not possible to obtain a license on the Windows operating system without Windows Media Player."¹⁴⁵ Q.E.D. This neatly gets around the fact that Microsoft's licenses contained no such restrictive provisions and did not

139. Hilti, *supra* note 13, at ¶ 8.

140. CFI Judgment, *supra* note 2, at 864.

141. Treaty Establishing the European Community, art. III, ¶ 81, 82(d), Aug. 31, 1992.

142. Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S v. Comm'n of the European Communities*, 2004 E.C.R. I-00123.

143. CFI Judgment, *supra* note 2, at 961.

"[I]n consequence of the impugned conduct, consumers are unable to acquire the Windows client PC operating system without simultaneously acquiring Windows Media Player, which means (see paragraph 864 above) that the condition that the conclusion of contracts is made subject to acceptance of supplementary obligations must be considered to be satisfied."

144. *Id.*

145. *Id.* at ¶ 962.

prohibit installation of another media player. Indeed, the *CFI Judgment*'s logic makes Article 82(d) (containing a privity restriction) redundant once behavior violating Article 82 is found, as long as the good or service restricted by behavior is sold or licensed via contract. Any non-contractual practice found abusive under any other provision of Article 82 EC inserts the coercion requirement into the contractual relationship under 82(d). Such circularity is only achieved by means of conflating bundling with tying.

On its face, the *CFI Judgment* holds that Art. 82(d) EC, contains a presumption that all bundling compels consumers to assume "supplementary obligations" directly or indirectly. Such a broad-brush presumption applied to bundling practices is not warranted either by Community case law or by economic theory. Tying as used by the Commission or by Community precedents is not just bundling "in different words."¹⁴⁶

C. THE CFI'S *MICROSOFT* DECISION CREATES SUBSTANTIAL CONFUSION

Up until the *Microsoft* Decision in the Court of First Instance, Community case law under Article 82 referred to tying as the ultimate abusive effect.¹⁴⁷ The *CFI Judgment* adopted the Commission Decision's four-part test to determine whether such effects were present based upon the *Hilti* and *Tetra Pak II* cases.¹⁴⁸ Paragraph 794 of the Commission Decision and 842 of the *CFI Judgment* name the following factors: (1) the tying and tied products are two separate products, (2) the undertaking concerned is dominant in the market for the tying product (3) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and (4) the practice in question forecloses competition.

146. While, for the purposes of the song, "Freedom's just another word for nothin' left to lose. Nothin' don't mean nothin' hon if it ain't free. . .," tying is not, for all purposes a fungible substitute for "supplementary obligations." (KRIS KRISTOFFERSON & FRED L. FOSTER, ME AND BOBBY MCGEE (circa 1969).)

147. *Hilti AG v Comm'n of the European Cmtys.*, T-30/89, and *Hilti AG v Comm'n of the European Cmtys.*, C—53/92 P (collectively "*Hilti*") *Tetra Pak Int'l SA v Comm'n of the European Cmtys.*, C-333/94 P ("*Tetra-Pak II*").

148. See *CFI Judgment*, *supra* note 2, at 852.

"[T]he Commission states that tying prohibited under Article 82 EC requires the presence of the four factors set out at paragraph 842 above." The fact that the "tying" was not objectively justified" is often referred to as a fifth factor but as paragraph 1144 of the *CFI Judgment* makes clear this is an affirmative defense whose burden of production and proof is on the dominant undertaking. However, as the Commission's requirement that the economic justification be "indispensable for the alleged pro-competitive effects to come into effect" (Commission Decision para 963, *CFI Judgment* at para. 1158) makes factor five something of a chimera as it is nearly impossible to prove.

See, e.g., Jochem Apon, *CASES AGAINST MICROSOFT: SIMILAR CASES, DIFFERENT REMEDIES*, E.C.L.R. 2007, 28(6), 327-36 at 331 [hereinafter "Different Remedies"].

This test is nearly identical with the *per se* (sometimes termed “modified *per se*”) treatment of tying claims under Section 1 of the Sherman Act, (15 U.S.C. § 1) enunciated in *Jefferson Parish*.¹⁴⁹ It is important to note that this test and its application in *Hilti* or *Tetra Pak* are not capable of distinguishing pro-competitive tying from anti-competitive tying.¹⁵⁰

The *CFI Judgment*, however, indiscriminately applied the terms bundling and tying to both the practices at issue and their effects. The *CFI Judgment* even refers to the *Hilti* and *Tetra Pak* cases as “the case-law on bundling” even though neither case uses the term.¹⁵¹ By using the words interchangeably, the *CFI Judgment* dispenses with any inquiry into whether or not a bundling practice includes a tying effect. In other words, one begins the analysis with the concept that a term incorporating much of the conclusion is functionally identical with terms used in the definitional start point. It should be borne in mind that *Jefferson Parish* focused on a contractually defined tie and did not purport to create a definition of when, or if, a non-contractual bundling practice created the effects of a tie. The test in the *CFI Judgment* dispensed with that inquiry by assuming without analyzing that the four-part test as applied to both situations.

The application of the terms bundling and tying as used in the *CFI Judgment* under Article 82, examining different economic behavior by a dominant undertaking under the same test, makes such definitions nebulous. As such they are unlikely to provide clear guidance to an undertaking with special responsibility not to distort competition in situations where common business practices may be the subject of special concern.

D. THE ROOT OF THE CFI’S DEFINITIONS MAY POSSIBLY BE TRACED TO THE 2005 DG COMPETITION DISCUSSION PAPER ON EXCLUSIONARY

149. *Jefferson Parrish*, 466 U.S. 2, 3 (1984). As the D.C. Circuit Court of Appeals observed:

There are four elements to a *per se* tying violation: (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce.

See Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 461-62, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992); *Jefferson Parish*, 466 U.S. 2, 12-18, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984). *U.S. v. Microsoft Corp.*, 253 F.3d 34,85 (2001) (*per curiam*). (Microsoft III). Commentators have recognized the near identity of the two tests. *See Different Remedies*, *supra* note 147, at 329-330 and David S. Evans and A. Jorge Padilla, *Tying Under Article 82 EC and the Microsoft Decision: A Comment on Dolmans and Graf*, LAW & ECO. REV, 7-8 (Aug. 2004) available at: <http://ssrn.com/abstract=596663> (last visited Mar. 18, 2009.)

150. Bundle and Tie, *supra* note 28, at 42 and nn 20 and 21 “We are not aware of any article in a mainstream economics journal or by an economist in a law review that finds that the *Jefferson Parish* rule could distinguish pro-competitive from anti-competitive tying.”

151. *CFI Judgment*, *supra* note 2, at 921, 969 & 970.

ABUSES

The *CFI Judgment* demonstrates the snowball effect of imprecise definitions creating ripples of greater and greater uncertainty. This is similar to the children's game of "telephone" in which the more times a message is transmitted incorrectly, the greater the distortion. The source may lie in the Commission's 2005 DG Competition Discussion Paper¹⁵² which attempted to define bundling and tying and state appropriate tests for when these practices constituted abuses by a dominant undertaking.¹⁵³ While it appeared that the Commission understood that there were differences among the different bundling practices and between tying and bundling the Discussion Paper attempted to deal with them all using the same economic approach. As pointed out by Economides and Lianos:

The Commission's officials refer in some parts of the Discussion paper, to mixed bundling as "commercial tying". In other parts of the Discussion paper the DG Comp's staff nevertheless remarks that there is a difference between these two practices in the sense the in mixed bundling none of the products is "tied in the traditional sense." For the discussion paper, both practices have similar foreclosure effects: Mixed bundling constitutes an indirect measure to achieve the same result as contractual tying "by inducing customers to purchase the tied product through granting bonuses, rebates, discounts or any other commercial advantage" It seems that, for the Commission's staff, coercion and inducement may produce the same effects and therefore, should be analyzed under the same standards.¹⁵⁴

The idea that "inducement"¹⁵⁵ i.e., the consumer's attraction to cheaper pricing, is equivalent to "coercion", or forcing consumers to buy things they don't want, flies in the face of the economic principle that lower consumer pricing is beneficial to consumer welfare.¹⁵⁶ Indeed,

152. European Commission, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, (Dec. 2005) available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> (last visited Nov. 3, 2009) [hereinafter "2005 DG Competition Discussion Paper"].

153. *Id.* at 55.

154. The Elusive Antitrust Standard, *supra* note 24 at p. 20.

155. See 2005 DG Competition Discussion Paper, *supra* note 152, at 55. ("[T]he possible abuse is the practice by which the dominant company either imposes customers the acquisition of one product or service conditional upon the purchase another (tying) product or forces or economically induces customers to only buy a bundle consisting of the two products (pure or mixed bundling)." (emphasis added.)

156. *Id.* (citing Hoffman-La Roche, *supra* note 26). Hoffman-La Roche's abuse consisted of conditioning discounts on "Full line forcing" a contractual arrangement which, in this case, conditioned rebates on the customer carrying its entire requirement of multiple products calculated upon prior years' sales. *Id.* at 80-81, 83 and 87. The ECJ made its determination based upon exclusive dealing and price discrimination. The practices in Hoffman La Roche do not meet any definition of "mixed bundling",

lower prices are *prima facie* considered consumer welfare enhancing. “In cases seeking to impose antitrust liability for prices that are too low, mistaken inferences are ‘especially costly, because they chill the very conduct the antitrust laws are designed to protect.’”¹⁵⁷ The U.S. Supreme Court observes simply: “Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . .”¹⁵⁸ Combining competitive inducement with predation for the sake of validating a rule prioritizes definitional processes over the legal certainty of the end result. Unfortunately, the CFI’s confusion of terms is understandable in that context, it institutionalizes, rather than clarifying, an economically useless test.

Moreover, in addition to recent economic literature suggesting that different forms of bundling and tying practices have greater or lesser potential for producing distortive economic effects, the CFI in *GE* recognized that different forms of bundling practices have different potentials for producing such effects.¹⁵⁹

IV. HOW THE MICROSOFT DECISION AFFECTS THE EXAMINATION OF THE ECONOMIC EFFECTS OF BUNDLING AND TYING PRACTICES

The economic effects test used by the Commission and by the CFI in the *Microsoft* case have been commented upon in numerous law review articles.¹⁶⁰ A number of articles have focused upon the Commission’s

nor does the case’s analytic underpinning support the Commission’s citation.

157. Linkline, 129 S. Ct. at 1120.

158. *Brooke Group Ltd., v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990)). See also *Cascade*, 515 F.3d at 896 (“Not surprisingly, the Supreme Court has instructed that, because of the benefits that flow to consumers from discounted prices, price cutting is a practice the antitrust laws aim to promote.”) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

159. See *GE*, *supra* note 31, at 368-369, 418 and 422.

Pure bundling conceivable only where the customers are the same and in the case of a multi-source platform the scope for pure bundling is very limited. In order for an undertaking to resort to “commercial blackmail” by refusing to supply individual component it must be established that customers “would have lost all residual power to hold out against the imposition of such a practice.

Id. at 429. (Technical bundling and its potential for strengthening a dominant position must be justified by a detailed analysis of the technical integration.), and *Id.* at 432 (Mixed bundling can have economic effects on the market only in so far as customers accept it and do not demand that the offer is unbundled product by product.).

160. David Howarth & Kathryn McMahon, “WINDOWS HAS PERFORMED AN ILLEGAL OPERATION”: THE COURT OF FIRST INSTANCE’S JUDGMENT IN MICROSOFT v COMMISSION, E.C.L.R. 2008, 29(2), 117-134 (2008), Jochem Apon, CASES AGAINST MICROSOFT: SIMILAR CASES, DIFFERENT REMEDIES, E.C.L.R. 2007, 28(6), 327-336 (2007) Stefan Kooths, The EU Commission’s Unbundling Ruling Against Microsoft, May 2005, <http://www.kooths.de/publications/index.php> (last visited Sept. 24, 2009), Christopher D. David & James F. Ponsoldt, *A Comparison Between U.S. and E.U. Antitrust Treatment of Tying Claims Against Microsoft: When Should the Bundling of Computer Software be Permitted?*, 27 NW. J. Int’l L. & Bus.

secondary market leveraging theory or have analyzed the issue of tying and bundling from theoretical and empirical points of view.¹⁶¹ It should be noted that the Commission Decision, unlike the Commission decision reviewed in *GE* does not directly refer to economic theories which, instead, are indirectly referred to via citation to Community case law, (the applicability of which may be questioned *infra*).

It is not my purpose to go deeply into details and underpinning of the articles and the cases and treatises they refer to. I shall, instead, direct the reader to some relevant points with the hope that they will be considered. However argued, one central point that cannot be elided is that the terms "bundle" and "tie" are not fungible synonyms. Arguments focusing on their differences are not "purely semantic".¹⁶² The fact that bundling may be analogous to tying does not mean that the practice is identical to it. Moreover, to the extent that the economic effects of bundling practices may be believed to be harmful, they are more accurately examined when separated into generally accepted subdivisions. Such subdivisions may then be identified by practices generally seen as having more or less significant tying effects. In turn, each type of bundling may be better evaluated against countervailing positive efficiencies or general welfare effects. The idea should not be to spend more effort in categorizing the practice than in examining its effects. Rather it is to focus more attention or resources on those practices raising a red flag as likely to create dangers to competition.

The CFI ignored its own examination of bundling practices in the

421 (2007) Nick Economides & Ioannis Lianos, The Elusive Antitrust Standard on Bundling in Europe and in the United States in the Aftermath of the Microsoft Cases, September 25, 2008, <http://ssrn.com/abstract=1078932> (last visited Sept. 24, 2009). See also David S. Evans, Albert L. Nichols & Richard Schmalensee, *United States v. Microsoft: Did Consumers Win?*, 1 J. Competition L. & Econ. 497 (2005).

161. Thomas A. Lambert, Evaluating Bundled Discounts, 89 Minn. L. Rev. 1688 (2005). Dieter De Smet, THE DIAMETRICALLY OPPOSED PRINCIPLES OF US AND EU ANTITRUST POLICY, E.C.L.R. 2008, 29(6), 356-62 (2008). Peter C. Cartensen, False Positives in Identifying Liabilities for Exclusionary Conduct: Conceptual Error, Business Reality, and Aspen, 2008 Wis. L. Rev. 295 (2008). William S. Comanor, Is There a Consensus on the Antitrust Treatment of Single-Firm Conduct?, Wis. L. Rev. 387 (2008). David Croson & Adam Saunders, Competition and Cooperation in the Bundled Software Market, <http://opim.wharton.upenn.edu/wise2004/sun221.pdf> (last visited Nov. 18, 2009). Herbert Hovenkamp, The Harvard and Chicago Schools and the Dominant Firm, September 1, 2007, <http://ssrn.com/abstract=1014153>, (last visited Sept. 24, 2009). Herbert Hovenkamp, The Legal Periphery of Dominant Firm Conduct, September 1, 2007, <http://ssrn.com/abstract=1014426> (last visited Sept. 24, 2009). Herbert Hovenkamp & Erik N. Hovenkamp, Exclusionary Bundled Discounts and the Antitrust Modernization Commission, May 8, 2008, <http://ssrn.com/abstract=1126723> (last visited Sept. 24, 2009). Barry Nalebuff, Bundling, Tying, and Portfolio Effects, February 2003, <http://www.berr.gov.uk/files/file14774.pdf> (last visited Sept. 24, 2009). Tu Thanh Nguyen & Hans Henrik Lidgard, *The CFI Microsoft Judgment and Trips Competition Flexibilities, and Trips Competition Flexibilities*, Int'l Trade L.J. 41 (2008).

162. CFI Judgement, *supra* note 2, at 850.

GE/Honeywell merger case.

Curiously, the *CFI Judgment* does not refer to its own decision in *General Electric Company v Commission of the European Communities*. (Extended Chamber) (“GE”) *GE* is the only Community case differentiating between different types of bundling, and describing the standards and competitive market required in order to demonstrate different forms of bundling.¹⁶³ *GE* defines several aspects of the practice and clearly distinguishes bundling from tying.¹⁶⁴ The CFI analyzed the Commission’s finding that the merger would result in the merged entity leveraging its market power into other markets by bundling General Electric’s jet engines with Honeywell’s avionics.

In *GE*, the CFI addressed the Commission’s finding that the merged entity would have had the incentive to engage in bundling practices which, the Commission asserted, while initially resulting in lower prices, would have the effect of eventually leading to the foreclosure of competition.¹⁶⁵ The Commission had advanced several different economic theories in support of its conclusions. The CFI considered it important to distinguish between the economic causes and effects of bundling practices.¹⁶⁶

While the *GE* decision never reached the merits of the Commission’s finding that bundling created exclusionary effects on secondary markets, the CFI clearly understood that bundling practices had different potentials for the abusive effects theorized by the Commission. It is hard to understand how the *CFI Judgment* would lump these practices together and create conundrums for those attempting to differentiate between business practices that may or may not have abusive effects.

Another parallel EU/US case illustrates why it isn’t necessary to label a practice bundling or tying in order to forward treaty policies

163. See, e.g., *GE*, *supra* note 31, at 407-473

Describing pure, mixed and technical bundling and analyzing the Commissions’s findings from the state of the market and from the standpoint of economics) and (“... a distinction must be drawn, in particular from the point of view of their effects, between the different types of bundling, namely mixed bundling’, pure bundling’ and technical bundling’.”)

Id. at 367 (from Court’s preliminary observations of Applicant’s objections) (Emphasis added).

164. *GE*, *supra* note 31, at 406.

It is also necessary to distinguish, as the applicant rightly states, between three distinct practices: pure bundling (where sales are tied by means of a purely commercial obligation to purchase two or more products as a bundle); technical bundling (where sales are tied by means of the technical integration of the products); and mixed bundling (where a number of products are sold as a package on more favourable terms than if the products are purchased separately). The Commission’s analysis of each of those three types of bundling is considered under separate headings below.

165. *Id.* at 366-78.

166. *Id.* at 406.

One of Crane's illustrations of procompetitive effects of bundling is that it may instill consumer loyalty.¹⁶⁷ Crane's example, uses reasoning identical to that of the Second Circuit Court of Appeals in *Virgin Atlantic Airways Ltd., v. British Airways PLC*.¹⁶⁸ That reasoning contrasts with the ECJ's treatment of the same bundled discounts in *British Airways plc v. Commission*.¹⁶⁹ The Second Circuit Court of Appeals analyzed British Airways' ticket sales as "bundled" rather than tying ticket sales while the ECJ termed the same business practices as a "bonus scheme" without ever using the terms bundling or tying.¹⁷⁰ The ECJ was able to identify wrongs and evaluate remedies without using bundling as a label or any of the formalistic tests proposed to analyze them. (The CFI's finding of no objective justification, (upheld by the ECJ), may also demonstrate the difficulty of proving an "objective justification" of economic efficiencies.)¹⁷¹ The ECJ's focus was on Loyalty Bonuses a particular policy concern in the EU with a history dating back to the *Michelin* and *Hoffman La Roche* cases. The ECJ's concern was whether the timing of the discount rebates had the predatory effect of holding customers "hostage" until they were paid at the end of the year. A tying analysis with its scrutiny of the justifications for their inclusion in the bundle or tie would have just been a distraction from solving the problem at hand.

A. USING LEGAL ANALYSIS BASED UPON ALL-ENCOMPASSING DEFINITIONS RISKS APPLYING STATIC ECONOMIC THEORY TO DYNAMIC BUSINESS MODELS

Evans and Hylton have recently pointed out that most examinations of industrial organization consider static competition and model their theories and tests on practices considered in a "snap shot" or short time frame. Longer run concerns are treated as "additional considerations" and are seldom operative features of the model.¹⁷²

167. GE, *supra* note 31, at 433-434

168. *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 265 (2d Cir. 2001).

169. Case C-94/04 P, *British Airways plc. v Commission of the European Communities*, 2007 E.C.R. I-02331 [hereinafter "BA v. Commission"].

170. Compare *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d at 269-72 (discussing the failure of proof that bundled ticket sales leveraged monopoly power) with Case C-95/04 P, *BA v. Commission*, at ¶ 11 (defining the identical practice as "the bonus schemes at issue" and repeating the phrase approximately 58 times. *BA v. Commission* never used the terms "bundling" or "tying").

171. *Bundle and Tie*, *supra* note 50, at 42 ("[B]ecause it is hard to prove efficiencies even when practices could not arise for anticompetitive reasons, it might also be hard to prove efficiencies required even by a rule of reason, much less whatever limited efficiency defense is allowed under the current per se rule.").

172. David S. Evans & Keith N. Hylton, *The Lawful Acquisitions and Exercise of Monopoly Power and its Implications for the Objectives of Antitrust*, Sept. 26, 2008, at 35-36, available at <http://ssrn.com/abstract=1275431> (last visited Mar. 14, 2009) [hereinafter "Objectives of Antitrust"]. (A later version of this paper was published in GCP, The Online Magazine for Global Competition

The focus on static competition in the market is not because economists have a bias against dynamic competition. Modern economics is based largely on developing mathematical models. It is hard enough to solve the equations of static models for unique situations and draw inferences from these equations. Oftentimes the models are very sensitive to assumptions that have been made about, for example, the functional relationships between certain variables. The mathematics of dynamic models is far more challenging and the likelihood that an economists who invests efforts in such models will achieve publishable results is lower. . . It is easy to use words to talk about dynamic competition as Professor Joseph Schumpeter did so eloquently, but it is much more difficult to use mathematics. . . When realism and relevance butt heads with analytical tractability, tractability almost always wins out in economics.¹⁷³

It is submitted that these considerations demonstrate that economic theories on bundling effects should be applied conservatively in abuse of dominance cases, especially in innovation industries. Over deterrence is more likely in situations where theories, sensitive to small deviations, are applied with a broad brush. As the D. C. Circuit Court of Appeals stated in a similar context:

We now address directly the larger question as we see it: whether standard per se analysis should be applied “off the shelf” to evaluate the defendant’s tying arrangement, one which involves software that serves as a platform for third-party applications. There is no doubt that “[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that *certain* tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable ‘*per se*.’” . . . But there are strong reasons to doubt that the integration of additional software functionality into an OS falls among these arrangements. Applying per se analysis to such an amalgamation creates undue risks of error and of deterring welfare-enhancing innovation.¹⁷⁴

I submit that the approach demonstrated by the Commission Decision and

Policy, Vol. 4 No. 2, November 1, 2008).

173. *Id.* at 36-41.

The authors illustrate this observation using the differences in treatment of welfare analysis on an innovator creating and then monopolizing a new market by means of a new product standard. They demonstrate the difference in the treatment of welfare gain/welfare loss under the static tradeoff analysis of the Chicago School measured against the displaced market, versus a dynamic market analysis where the monopolist’s investment has created the market.

174. Microsoft III, 253 F.3d at 89-90 (citation omitted) (emphasis added).

the *CFI Judgment* are indeed “off the shelf” approaches to a not very well understood set of practices.

B. THE COMMISSION’S NEW TRUNCATED TYING TEST INCORPORATED THE CFI JUDGMENT’S CONFLATION OF BUNDLING WITH TYING

The Commission recently truncated its effects test, even eliminating one of the elements it used in the Commission Decision.¹⁷⁵ This new test, enunciated by the Commission on December 12, 2008, and reissued 24 February 2009, follows the *CFI Judgment* by conflating tying with bundling and applying the same standards to both.¹⁷⁶ It likewise omits the requirement (in the Commission Decision) of proof that consumers were not given the choice to obtain the tying product without the “tied” product.¹⁷⁷ Under this standard, first announced a little over a month prior to the Commission’s issuance of its latest SO against *Microsoft*, a dominant undertaking is at risk of being found guilty of tying even if the good or service is available in a mixed bundle. In effect, the Commission no longer requires consideration of the existence of coercive effect (long held to be the *sine qua non* of tying) as necessary element of the offense, and now relies upon a mere showing of “likelihood of competitive foreclosure.”¹⁷⁸ The coercion standards for bundling are now listed as “factors” of importance such as whether the business strategy is “lasting”¹⁷⁹ or based upon the number of dominant products in the bundle.¹⁸⁰ In essence, the Commission adopts the same foreclosure standard as the Third Circuit in *LePage’s* along with the danger that the exclusion of a less efficient competitor will result in liability.¹⁸¹

175. See COM 832, *supra* note 6, at ¶ 49. (“The Commission will normally take action under Article 82 where an undertaking is dominant in the tying market . . . and where, in addition, the following conditions are fulfilled: (i) the tying and tied products are distinct products, and (ii) the tying practice is likely to lead to anticompetitive foreclosure. . .”) (Now found at ¶ 50 of the Reissued Guidance, *supra* note 6).

176. *Reissued Guidance*, *supra* note 6, at ¶ 47 (“A dominant undertaking may try to foreclose its competitors by tying or bundling. This section sets out the circumstances which are most likely to prompt an intervention by the Commission when assessing tying and bundling by dominant undertakings.”).

177. *Id.* at ¶ 48 (Equating pure bundling by a dominant undertaking with tying by defining “tying” as a situation in which the consumer has no choice to purchase the second good by itself and “pure bundling” as a situation in which the goods are only available as a package).

178. *Compare Id.* with The Elusive Antitrust Standard, *supra* note 24, at 29 (EU and US tying law requires coercion).

179. *Reissued Guidance*, *supra* note 6, at ¶ 52.

180. *Id.* at ¶ 54. (stating that a multi-product bundle creates the danger of greater exclusionary effects where a competitor cannot match the product offering).

181. See *Cascade*, 515 F.3d at 899.

“As the bipartisan Antitrust Modernization Commission (“AMC”) . . . recently noted, the fundamental problem with the *LePage’s* standard is that it does not consider whether the bundled discounts constitute competition on the merits, but simply concludes that all bundled discounts offered by a monopolist are anticompetitive with respect to its

Paragraph 52 of the Reissued Guidelines creates a “Catch-22” scenario out of behavior specifically sanctioned by the ECJ in *Glaxo II* and *Kanal 5*. It reads: “However, even when the aim of the tying or bundling is to protect the dominant undertaking’s position in the tying market, this is done indirectly through foreclosing the tied market.” Paragraph 52 thus creates the presumption that a dominant undertaking’s use of bundling to protect its market in the tying good may only be accomplished by foreclosure effects in the market for the tied good. By treating tying and bundling as equivalents and creating a large list of “tests” for exclusionary effects the Guidelines not only ignores established economic theory but recent holdings of the ECJ.

Paragraph 48 of the Reissued Guidance, by including in the definition of “mixed bundling” and “multi-product rebates”¹⁸² permits using imprecise measurements of product cost such as average variable cost, or the even more imprecise long-run incremental cost approach, to find that bundle pricing has caused the indirect market foreclosure identified in paragraph 52.¹⁸³

These guidelines, following in the wake of the CFI’s conflation of the effects of bundling with tying practices create considerable confusion for dominant undertakings and difficulties in divining whether an effect was produced by efficient competition or by market distortion. Moreover, as demonstrated by the Commission’s recent SO against Microsoft, their application would result in too many false positives.

C. THE RECENT ‘SO’ AGAINST MICROSOFT CONTAINS A LESSON IN TYPE I AND II ERRORS FROM ‘BROAD BRUSH’ APPROACHES TO EXCLUSIONARY

A real world example of Type I and II errors¹⁸⁴ arising from broad application of the secondary market exclusion theory comes out of the *CFI Judgment* itself in which it was “proven” that Microsoft Corp’s supply of WMP along with its Operating System deterred market entry of competing Media Players. The theory is adopted in truncated form by the Reissued Guidelines. This bundling leveraging theory is equally applicable to Microsoft’s Internet Explorer, which Microsoft has included along with its

competitors who do not manufacture an equally diverse product line.”

182. Compare Reissued Guidance, *supra* note 6, at ¶ 48 and ¶ 60.(permitting Commission to find exclusionary effect if a bundle is sold below LRAIC).

183. See Crane, *supra* note 19, at 445 (citing Phillip Areeda, Donald F. Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 716-18 (1975)).

184. Alan Devlin, Bruno Peixoto, *Reformulating Antitrust Rules to Safeguard Societal Wealth*, 13 STAN. J.L. BUS. & FIN. 225, 231, (Spring 2008) [hereinafter “Reformulating Antitrust”] (“A Type I error arises when a proper null hypothesis is erroneously rejected. . . . Type II errors occur when socially desirable business practices are struck down. A Type II error occurs when an improper null hypothesis is mistakenly accepted”) (citing Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 Stan. L. Rev. 1477, 1504 (1999)) (citation omitted).

Operating System since 1994 and, which was the subject of the DOJ's claims in Microsoft II and III. DG Competition's SO against Microsoft, follows the same road, claiming that Microsoft's "inclusion of Internet Explorer in Windows since 1996 has violated European competition law. According to the statement of objections, other browsers are foreclosed from competing because Windows includes Internet Explorer."¹⁸⁵ Mozilla Foundation, creator of the Firefox browser, joined the investigation to provide technical help to the Commission.¹⁸⁶ Firefox browser, launched November 9, 2004, reached a 28% EU market share by December 2007,¹⁸⁷ with 2007 worldwide income of approximately USD \$75 million.¹⁸⁸ In November 2008 Firefox had reached an approximately 31% European Market Share while Internet Explorer's share for all versions had fallen to 59.5%.¹⁸⁹ In 2009 Firefox 3.0 actually *exceeded* the EU market share for Internet Explorer 7¹⁹⁰ while the market share for all versions of Internet Explorer is just 10% higher than the market share for all versions of Firefox. (Firefox is only available via download, which should be understood in light of the Commission's dismissal of Microsoft's defense that other Media Players could be easily downloaded.)¹⁹¹ The

185. Microsoft Corporation SEC Form 10-Q, (December 31, 2008) at p. 44, *available at* http://idea.ec.gov/Archives/edgar/data/789019/000119312509009386/d10q.htm#toc32664_11 (last visited Mar. 15, 2009).

186. Statement by Mitchell Baker Chairman, Mozilla Organization on his blog site (February 6, 2009), *available at* <http://blog.lizardwrangler.com/2009/02/06/the-european-commission-and-microsoft> (last visited Mar. 20, 2009).

187. See XiTi monitor, *available at* <http://www.xitimonitor.com/en-EN/barometre-desnavigateurs/firefox-decembre-2007/index-1-1-3-117.html>, (French) (28% EU Market Share) (last visited Mar. 15, 2009).

188. See Mozilla Foundation and Subsidiary Audited Financials 31 December 2007 and 2006. Mozilla Foundation Blog entry, (Posted November 19, 2008), *available at* <http://blog.lizardwrangler.com/2008/11/19/sustainability-in-uncertain-times/> (last visited Mar. 15, 2009) (Interestingly enough, as Firefox's business model involves the product's distribution for free, the Commission's intervention would appear to champion Firefox's sale of its product for below average variable cost.); See, e.g., Case C-202/07, France Telecom SA v Commission, ECR 2009, 00000, ¶¶s. 107 & 109 ("France Telecom"), Case C-62/86, AKZO Chemie BV v. Commission ECR 1991, I-3359 ¶ 72, and 2001/354/EC: Commission Decision of 20 March 2001 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/35.141 — *Deutsche Post AG*) (Text with EEA relevance) (notified under document number C(2001) 728) OJ L 125, 05/05/2001 P. 0027 – 0044 para. 35) (This is the ultimate *reductio ad absurdum* of attempting to remedy an alleged violation of Art. 82 EC by a Commission assisted abuse of Art. 82 EC. Especially since Firefox itself would appear to be on the verge of becoming a dominant undertaking in the browser market.)

189. See XiTi report of Average European Web Visit Distribution for November 2008, *available at* <http://www.atinternet-institute.com/en-us/browsers-barometer/browsers-barometer-november-2008/index-1-2-3-153.html> (last visited Mar. 15, 2009).

190. Ars Technica, Web analytics firm StatCounter use statistics for Weeks 4-13, 2009, *available at*: <http://arstechnica.com/open-source/news/2009/03/firefox-3-marketshare-exceeds-internet-explorer-7-in-europe.ars> (last visited May 17, 2009).

191. Commission Decision, *supra* note 3, at ¶¶ 865-869. (difficult for unsophisticated users to download) and especially at *Id.* at ¶ 871.

"[D]ownloading is not an adequate alternative to pre-installation.") As observed by Kooth, customers who lack the technical awareness to download an alternative product

Schumpeterian success of Firefox appears to shoot an Arrow into the Commission's bundling/tying analysis.

D. THE ECJ'S RECENT DECISIONS ON OBJECTIVE JUSTIFICATION FOR INFRACTIONS OF ARTICLE 82 EMPHASIZES THE IMPORTANCE OF DISTINGUISHING BETWEEN BUNDLING AND TYING PRACTICES

Separating objective justification from the initial analysis of the existence of an abuse places the entire burden upon a dominant undertaking's shoulders to explain how its actions fit into the normal operation of a particular market structure. Moreover, the concept of "objective justification" and the point at which economic defenses should be considered have recently been examined and clarified in two recent ECJ cases.¹⁹² The ECJ's clarification of when positive economic effects or business usage should be inserted into an Article 82 analysis. Unlike Article 81 EC, Article 82 EC does not include a specific set of defenses.¹⁹³ Previously the ECJ endorsed the concept that an abuse of Article 82 by a dominant undertaking may be defended as "objectively justified". However, as pointed out by AG Jacobs in his opinion in *Glaxo I*,¹⁹⁴ a two-stage analysis was conducted under which a negative conclusion as to the existence of abuse was made by the Commission and the dominant undertaking was then compelled to come back with a justification which

would have problems should the product be unbundled. See Kooth, *supra* note 193 at p 6.

In the absence of a browser installation by an OEM one may well ask how any consumer could download a non-Microsoft browser, especially one available only via the Internet.

192. *Sot. Lelos kai Sia EE v. GlaxoSmithKline AVEE Farmakeftikon Proionton*, formerly *Glaxowellcome AVEE*, joined cases C-468/06 to C-478/06 (Grand Chamber) ECR 2008, 00000 ("Glaxo II") and C-52/07, *Kanal 5 Ltd. v. Foreningen Svenska Tonsattaes Internationella Musikbyra (STIM)* upa, ECR 2008, 00000. ("Kanal 5").

193. Article 82 (d) condemns supplementary obligations which "by their nature or according to commercial usage, have no connection with the subject of such contracts." One can infer a defense to abusive behavior based upon commercial usage. However, the *CFI Judgment* summarily dismissed this possibility in a case where the dominant undertaking holds a "de facto" monopoly. *CFI Judgment*, *supra* note 2, at ¶¶ 940-941.

194. Opinion of Mr Advocate General Jacobs delivered on 28 October 2004. Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) v. GlaxoSmithKline plc*, 2005 E.C.R. I-04609, ¶ 72 at I-4628.

72. In any event, however, as the Commission submits, it is clear that the Community case-law provides dominant undertakings with the possibility of demonstrating an objective justification for their conduct, even if it is *prima facie* an abuse, and I now turn to the issue of objective justification. I would add that the two-stage analysis suggested by the distinction between an abuse and its objective justification is to my mind somewhat artificial. Article 82 EC, by contrast with Article 81 EC, does not contain any explicit provision for the exemption of conduct otherwise falling within it. Indeed, the very fact that conduct is characterized as an abuse' suggests that a negative conclusion has already been reached, by contrast with the more neutral terminology of prevention, restriction, or distortion of competition' under Article 81 EC. In my view, it is therefore more accurate to say that certain types of conduct on the part of a dominant undertaking do not fall within the category of abuse at all.

was “objective.” The burden of proving an objective justification was thus put completely upon the defendant. AG Colomer adopted this part of AG Jacobs argument in *Glaxo II* reasoning that, since Article 82 was drafted without defenses the burden of proof was on the party alleging an abuse to demonstrate as part of its case-in-chief, that there was no objective justification for the behavior.¹⁹⁵

195. Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 1 April 2008. Joined Cases C-468/06 to C-478/06, Sot. Lelos kai Sia EE v. GlaxoSmithKline AEVE Farmakeftikon Proionton, at paras. 67-75, http://curia.europa.eu/jcms/jcms/j_6/ (search by case number).

67. Drafted as it is, without a provision dealing with exemptions for certain abuses, an analysis of conduct requires undertakings holding a dominant position in a particular market to engage in a dialectical debate with the competition authorities, whether national or Community, and with the affected parties.

68. Each of these participants in the rhetorical debate brings evidence of its assertions, in accordance with the old Latin adage *ei incumbit probatio qui dicit, non qui negat* (the burden of proof is on him who alleges and not on him who denies).

69. This being the case, if certain conduct always give rises to a legal presumption that an abuse has occurred, dominant undertakings would be deprived of their right to defend themselves, since, as I have indicated, the structure of Article 82 does not permit any exemptions; consequently, once the abuse has been proved, the finding of an infringement follows, unless there are adequate indications that it has not been committed.”

70. Furthermore, the examples listed in subparagraphs (a) to (d) of the second paragraph of Article 82 EC do not operate as legal presumptions, unlike those in Article 81(1)(a) to (e). At most they should be understood, due to their underlying economic logic, as rebuttable presumptions which lighten the burden of proof for the party relying on them, (42) but never as substitutes for the dialectical debate which I have referred to above. In the same way that collusive practices per se under Article 81 EC were redeemed by Article 81(3) EC, the option of accommodating certain types of abuse under Article 82 EC by means of objective justification should remain open.

ii) Economic considerations

71. In the first place, to accept the idea of abuses per se of a dominant position would run counter to the proposition that it is necessary to examine each case within the economic and legal context in which it arose.

72. Secondly, from a purely economic perspective, the approach per se is too form-based, a defect criticised by some very informed commentators who advocate an alternative approach to Article 82 EC, which would focus on the effects of each abuse and involve a consideration of the specific circumstances by applying an ‘analysis of the merits’ (43) (or a ‘rule of reason’). (44)

73. Allowing preconceived and formalistic ideas on abuse of a dominant position to prevail would mask the fact that sometimes dominance can benefit consumers. (45) This is the case when the strength of one operator reduces competition in a particular market, given that Article 82 EC does not include any provision whereby such operators can successfully defend themselves against the accusation of abuse by demonstrating the economic efficiency of their conduct, an absence which has been justly criticised. (46)

74. Thirdly and lastly, if, as has been said, it is common to divide the circumstances in which Article 82 EC applies into two categories, namely those that harm consumers (exploitative abuses) and those that harm actual or potential competitors (exclusionary abuses), (47) so that any anti-competitive conduct of a dominant undertaking is capable of constituting an abuse, (48) as there is no indication of the relative importance of these two aspects of Article 82 EC, (49) a defence of the dominant

The ECJ, in *Glaxo II* essentially adopted AG Jacob's and AG Colomer's recommendations and required that the initial analysis of whether a dominant undertaking's actions constitute abuse include a determination of whether or not the behavior is within the range of "normal" behavior in a particular market. In *Glaxo II*, the first question referred by the Greek Court was whether the defendant's refusal to supply orders where a Member State's regulatory regime encouraged parallel trade arbitrage in other states was a "per se" abuse under Article 82.¹⁹⁶ The ECJ interpreted this as whether or not various market factors should be analyzed to determine if such refusal was objectively justified.¹⁹⁷ The Polish Government and the Commission argued that was the defendant's burden to establish objective justifications for its behavior, and the Appellants argued that the only justifications cognizable were those found in Article 30 EC.¹⁹⁸ (the approach taken in the *CFI Judgment*)¹⁹⁹ The ECJ however, held that the circumstances in that business sector must first be examined in order to determine whether or not the dominant undertaking's behavior "does not, generally speaking, constitute an abuse."²⁰⁰ After determining that a refusal to supply in order to bar all parallel trade violated Article 82 the Court held:

[I]t is sufficient to state that, in order to appraise whether the refusal by a pharmaceuticals company to supply wholesalers involved in parallel exports constitutes a reasonable and proportionate measure in relation to the threat that those exports represent to its legitimate commercial interests, it must be ascertained whether the orders of the wholesalers are out of the ordinary. . .²⁰¹

The ECJ then went on to hold that a dominant undertaking's reasonable and proportionate responses to commercial threats by refusing to supply orders which were out of the ordinary was not an abuse of its dominant position.²⁰² The *Glaxo II* Court further held that it was, in the first instance, the responsibility of the Court to determine, in the light of market conditions and previous dealings whether or not such orders were ordinary.²⁰³ This results in a significant shift in burdens and makes it the

company based on economic results obtained might be advocated.

75. A mere comparison of the positive and negative consequences for consumers and for other operators in the same market provides sufficient information to draw the relevant conclusions

196. *Glaxo II*, *supra* note 194, at 23.

197. *Id.* at 29.

198. *Id.* at 46-48.

199. *CFI Judgment*, *supra* note 2, at 1144.

200. *Glaxo II*, *supra* note 194, at 51.

201. *Glaxo II*, at 70 (citation omitted.).

202. *Id.* at 71-72.

203. *Id.* at 73.

responsibility of the Court (or Commission) to determine *ab initio* whether or not a dominant undertaking is acting in accordance with market conditions instead of making it part of a defensive response. Any action "out of the ordinary" is what is now termed abusive. In the words of the ECJ that sort of "behavior cannot be accepted if its purpose is specifically to strengthen that dominant position and abuse it."²⁰⁴

The effect of *Glaxo II* is to harmonize the burdens of proof under Article 81(1) and 81(3) (the "restriction of competition" requirement under Art. 81(1) enunciated in *Société la technique Minière v Maschinenbau Ulm GmbH*²⁰⁵ with the allocations of burdens under Article 82. In effect, *Glaxo II* requires the complaining agency to find that bundling has distorted allocative efficiency before it can be considered to violate Art. 82 EC. In oligopolistic markets such as exist in software or innovative markets homogeneous alternatives provide no additional economic benefit, implying that allocative efficiency is not implicated by bundling "middleware."²⁰⁶

Placing this seemingly modest requirement on the shoulders of the initial adjudicator should bring a world of change. It must be born in mind that *Glaxo II* was initiated by private parties bringing suit against the dominant undertaking in the Greek judicial system where the first finder of fact was a court. The ECJ's requirement that this first adjudicator be responsible to determine whether an action was "out of the ordinary" is equally applicable to the Commission when determining whether it should uphold an SO. This shift in burdens is significantly different from either its treatment in the Commission Decision, Regulation 1,²⁰⁷ or even from the proposed rule in the 2005.²⁰⁸ DG Competition Discussion Paper which is echoed in the *CFI Judgment* and the former rebuttable presumption approach.²⁰⁹ This should also inform present practice under Regulation 1,

204. *Id.* at 50. (Emphasis added.) See also Kanak 5, *supra* note 194 at 26-27.

205. Case 56/65 [1966] ECR 235. See also Mel Marquis, O2 (GERMANY) v COMMISSION AND THE EXOTIC MYSTERIES OF ARTICLE 81(1) EC, E.L. REV. 2007, 32(1), 29-47 (2007) at 37-38 positing that the initial burden under Art. 81(1) is for the agency to demonstrate that the act or agreement creates allocative inefficiency while the undertaking's burden under Art. 81(3) is to demonstrate its productive efficiencies.

206. See Kooth, *supra* note 160, at 5.

207. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) OJ L 1, 04/01/2003 p. 1 ("Regulation 1").

208. DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses of 19,(December 2005)("DGC Discussion Paper"), available at: <http://74.125.77.132/search?q=cache:iP3Q4S2VgEcJ:ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf+discussion+paper+on+the+application+of+article+82+of+the+treaty+to+exclusionary+practices&hl=sv&ct=clnk&cd=1&gl=se> (last visited February 22, 2009.).

209. *Id.* at 188:

Where the Commission on the basis of the elements described below finds that the dominant company ties a sufficient part of the market the Commission is likely to reach the rebuttable conclusion that the tying practice has a market distorting foreclosure effect

Art. 2²¹⁰ where the Commission makes findings of an undertaking's activities infringement without analysis of business behavior in the sector, which puts it to the undertaking to prove economic justifications under its burden to prove "objective justifications." This leads to widespread condemnation where the activity in question is ubiquitous like tying or bundling.

The new rule also appears to contradict DG Competition Position Paper's statement: It may be abusive for a dominant company to tie sales of products even when this is in accordance with commercial usage in the market.²¹¹

Glaxo II also changed the model for market analysis from merely isolating a relevant market and perhaps the practices' effect upon secondary markets. It now requires an examination of how secondary markets affected business practices in the market sector in which the dominant undertaking operates. Because the situation in the "business sector" must be examined in determining whether a practice is ordinary, the relevant market definition should not be narrowly construed when determining if behavior constitutes an "abuse." The requirement appears to be in addition to an undertaking's ability to mount an affirmative defense. This is also important since it is difficult for an undertaking to objectively demonstrate the existence of efficiencies introduced by bundling or tying.²¹²

This "look both ways before crossing" approach better comports with business realities and clarifies Article 82 (d). In *Glaxo II*, the National Court was required to examine not only the Greek market but also the markets in other Member States in order to make the "ordinariness" determination. For example, the ECJ's market examination requirement would have mandated a different approach in *Microsoft* in at least three

and thus constitutes an abuse of dominant position. (Emphasis added.)

The "elements described below", from paragraphs 188-203 consists of the formula used to determine effects. Market structure and other issues required under *Glaxo II*, are left to the dominant company to rebut. See *id.* at paras. 204-206 "Possible Defences: Objective Justifications and Efficiencies." (The Commission Decision utilized this framework when it purported to examine the market structure but left proof of efficiency and welfare defenses and demonstrations of market norms to Microsoft.)

210. Regulation 1 Art. 2 provides:

In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

211. DG Competition Discussion Paper, *supra* note 210, at 182.

212. Bundle and Tie, *supra* note 28, at 88. "The fact that product-specific scale economies are not easy to document in practice, together with the fact that tying is presumptively efficient, leads us to argue that defendants should not bear too onerous a burden of proving efficiencies."

ways. First, the fact that the Microsoft OS was a de facto standard-but not a monopoly would mandate a closer look at the practices of the other competitors and "mavericks"²¹³ to establish whether they bundled media players with their operating systems and not dismiss the suggestion out of hand.²¹⁴ Second, the Commission, which used OEM's as proxies for consumers would also have to examine whether or not the OEM's in the market could, or did, exert their market power to either accept or reject the bundling.²¹⁵ Third, the Commission would have had to examine how other markets operated such as the non X86 markets where Apple and other consumer and commercial computer makers operated.

The *Glaxo II*, *Kanal 5* approach also harmonizes the analysis of tying under Article 81 with the analysis of tying under Article 82. In *Delimitis* the ECJ advised the referring court on how to analyze the effect of a tying contract in a network industry. In paragraphs 19-26 the ECJ required a similar initial "rule of reason" type analysis of whether or not Article 81(1) was violated before a Court considers defenses under Article 81(3).²¹⁶

213. Objectives of Antitrust, *supra* note 174, at 42-43, *see also* Brooke Group Ltd., v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223-224 (1993) (Price cuts in an oligarchic market used to deter a "maverick" from entering the market by discounting prices to below cost levels.)

214. CFI Judgment, *supra* note 2, at 940. ("Second, as the Commission rightly observes, it is difficult to speak of commercial usage in an industry that is 95% controlled by Microsoft.")

215. *See, e.g.*, Bundled Rebates, *supra* note 71 at 352:

For these end-user analyses to apply to bundled rebates, complement good suppliers, for example, retailers or distributors, have to be proxies for the end users that they ultimately serve. This may be valid when each retailer or distributor has a monopoly over some set of end users. Then, they may be thought of as agents of the buyers, albeit even there not perfect, unless they can appropriate the entire surplus from those final customers. However, when the firms compete, their interests diverge from those of their customers. Unlike their customers, they can enter and exit. Most fundamentally, because they compete with one another, their demands are interdependent. Because one competitor's demand for a product depends on the price that they can get, the demand from one buyer depends on the prices paid by other buyers.

These differences have both theoretical and practical effects. As a matter of theory, interdependence of demands can lead to situations where price discrimination across buyers can lead to everyone's prices going up. . . . Raising prices to one buyer boosts demand from a second buyer, potentially raising the profit-maximizing price that could be charged to the latter. Ordover and Panzar show that a monopolist would lose by charging a two-part tariff with marginal cost pricing, even when buyers are identical. . . . The up-front fee, which extracts surplus in the context of end users, creates an artificial economy of scale when thinking about firms qua buyers. This affects entry and exit, leading to too few buyers operating at inefficiently large scales, to the detriment of the upstream monopolist. (Footnotes omitted.)

216. *Delimitis*, *supra* note 118, at 27.

(citing that Article 81(1) is violated if 1. "having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access. . .", and, 2. "that the agreement in question must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context." At that point, a court may then consider the defenses under Article 81(3). *See Delimitis* para. 55. I see no reason why, once an undertaking becomes dominant and has a "special responsibility" to competitors

Glaxo II and *Kanal 5* also signal significant convergence with the approach to bundling and tying taken by the D.C. Cir. in *Microsoft*.²¹⁷

This is important for several reasons. Article 82 EC, (unlike its cousin, section 2 of the Sherman Act) does not require an explicit finding of harm to competition or to the competitive process, at least in the secondary market, only the potential for harm.²¹⁸ This point has been largely overlooked in comparisons of the U.S. and EU *Microsoft* cases.²¹⁹ However, the ECJ now requires the examining authority to make an initial determination as to whether or not the claimed abuse empirically constitutes an abuse of how the market normally functions. This is accomplished with an analysis, in the first instance, as to whether or not behavior is in the “normal” range of competition. The approach also goes a long way to achieve a quiet convergence in this regard between Article 82 and section 2 of the Sherman Act since the ECJ formulation assumes that the harm to competition stems from practices outside the norm.

Kanal 5 is also of great interest for three reasons. The first is that it endorses the shift in burdens from *Glaxo II*,²²⁰ (as well as demonstrating that the holding was not limited to the pharmaceutical sector.) The second point is that it specifically grants a wider scope to a defense of economic justification for bundling practices such as blanket licensing. In *Kanal 5*, STIM was engaging in blanket licensing, which may be understood as a form of multi-product “pure bundling.”²²¹ This second point becomes apparent when it is considered that the defendant in *Kanal 5*, STIM is an organization, which grants package licenses for the rights of its members holding a copyright for musical works. These bundles include the rights for works that are not used by the licensee. The situation where an entity is contractually required to purchase a package, which contains a product or right, which it doesn’t want or use is also usually referred to as a “tie.”²²²

that a tying practice becomes a per se anticompetitive violation of Article 82 which may only be defended by “objective justification” as set out in the Reissued Guidance. Having two standards make it difficult to tell an undertaking when to switch business practices when it approaches market dominance.)

217. See *Microsoft III*, 253 F.3d at 95-98.

218. See *Legal Periphery of Dominant Firm Conduct*, *supra* note 161, at 15 “What seems not to be very well worked out in EU law is the degree of harm in the secondary market that is necessary to support this leveraging offense.”

219. *Id.* at 14-16.

220. *Kanal 5*, *supra* note 195, at 26 (distinguishing between a dominant undertaking taking reasonable steps to protect its interests and where the purpose of such behavior is to strengthen and abuse its dominant position.)

221. See, e.g., Kobayashi Survey, *supra* note 22, at 710-712.

222. See generally, Jefferson Parish, *supra* note 12; Reissued Guidelines, *supra* note 6, at 48, but see, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* 441 U.S. 1, 24 (1979) (respondent failed to appeal from dismissal of tying claims below), and *Bundles of Joy*, *supra* note 31, at 25 (blanket licenses are not bundled in fixed proportions and authorize unlimited use).

STIM also holds a *de facto* monopoly on licensing these works.²²³ The first of the two sets of questions referred to the ECJ considered whether or not an organization with a *de facto* monopoly abuses its dominant position by calculating its royalties based upon its client's sales revenues, and the effect of using another method that would identify works that were actually used.²²⁴ The ECJ held that transaction costs for supplying this bundled service provided by this *de facto* monopolist must be taken into account before the question of the proportionality of the price could be examined.²²⁵

The third point made by the ECJ in *Kanal 5* in answering the second set of referred questions was that differential pricing for tying bundles in the same or related market could be justified if the information or transaction costs made it impossible or impractical to determine the price in another way.²²⁶

It makes sense to first distinguish between types of business practices which are normally pro-competitive such as bundling and focus on those sub divisions of the business practice which may be more difficult to assess. If definitions must be applied, it is best to follow the adjectival differences found in the practices rather than the label defining the practice as a whole.

V. PROPOSAL FOR A LINGUISTIC SCREEN

It seems clear from all of the above that the imposition of formalistic rules on behavior labeled bundling or tying carries with it a significant probability that behavior which poses little risk to competition will be punished or deterred by Type I and Type II errors. One linguistic clue indicating an elevated possibility that formalism governs over reality is when the word tying is substituted for bundling at the commencement of the inquiry or when a form of bundling behavior is termed "commercial tying." From that point, once the legal conclusion contained in the label is used, the process focuses upon fitting the "punishment to the crime."²²⁷

223. *Kanal 5*, *supra* note 195, at 7.

224. *Kanal 5*, *supra* note 195, at 17.

225. *Id.* at 40-41.

[A]pplication of such a model may amount to an abuse, in particular when another method exists which enables the use of those works and the audience to be identified and quantified more precisely. . . *without, however leading to a disproportionate increase in the costs incurred for the management of the contracts and the supervision of the use of musical works protected by copyright.* (Emphasis added.)

226. *Id.* at 36-40.

227. See, e.g., W. S. GILBERT AND ARTHUR SULLIVAN, *THE MIKADO*, NO. 6 SONG, A MORE HUMANE MIKADO, 1885:

It is my very humane endeavour
To make, to some extent,

Thus creating the danger that tying doctrines, primarily developed in the context of contractual coercion (whose written provisions often provide requisite proof of bad intent) will subtly imply intent into objectively-measured, non-contractual behavior under Article 82 EC.²²⁸

Moreover, it is evident that the term bundling is hardly ever used by itself in competition law analysis. The noun is almost invariably preceded by an adjective. Bundling has sprouted a huge number of connotative adjectives which themselves are hardly ever the focus of either legal or economic scrutiny. The indiscriminate use of such adjectives can amount to a mere "Tool-Box" from whence a prosecutorial agency or a private plaintiff may snatch a connotative or pejorative term and attach it to a broad definition of economic conduct thus guaranteeing the formalistic application of competition rules. As such, these adjectives transform the inquiry into a form of Scholastic reasoning designed to confirm belief rather than a tool for economic and legal inquiry. Application of the principles of Ockham's Razor²²⁹ to these adjectival qualifications would indicate that theories requiring more assumptions or longer names are less likely to be true than ones with fewer assumptions.

I do not propose to ignore a hundred years of case law and legislation on tying and bundling. I merely propose that these terms be used as filters

Each evil liver
A running river
Of harmless merriment.

My object all sublime
I shall achieve in time —
To let the punishment fit the crime —
The punishment fit the crime;
And make each prisoner pent
Unwillingly represent
A source of innocent merriment!
Of innocent merriment!

228. See, e.g., Case C-552/03, Unilever Bestfoods (Ireland) Ltd. v Comm'n of the European Communities, P. ECR 2006, I-09091 at ¶129. (citing Hoffman La Roche, *supra* note 26, at 91.) (Abusive effect under Article 82 of contracts with exclusive dealing clauses on market structure.):

The concept of abuse of a dominant position is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of economic operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition

229. "Entia non sunt multiplicanda praeter necessitatem" (Commonly translated as "Assumptions should not be multiplied beyond necessity.") (William of Ockham (*a/k/a* Occam), b.1284 d 1347) (Some commentators doubt if the "Invincible Doctor" ever wrote these words. See, e.g., WILLIAM THORBURN, *THE MYTH OF OCKHAM'S RAZOR*, Mind 27 345-353 (1918). However, the principle of nominalism incorporated into the statement is a valuable logic tool.

and not as legal rubrics compelling conclusions. The terms bundling or "bundle" should be used differently and great care where there is no contractual compulsion. There should be a greater level of skepticism once adjectival terms are required to fit the description of a practice. In such a case, crafting a compound name in order to fit a practice does not add to an understanding of its actual effect on competition.

Accordingly, I propose that if the practice is, or can easily be analogized to physically selling the product or service in a package *ex ante* it should be called bundling and be presumptively economically efficient. Tying should be reserved to a legal conclusion that a practice coerces purchasers after consideration of efficiency defenses. Contractual provision having the effect of tying in or tying out goods or services may be urged as having supplied the requisite level of coercion *ab initio* otherwise the tie is an element to be proven as in *Hoffman La Roche*.²³⁰

Indirect competition effects, especially those involving secondary markets should be dealt with under the most appropriate existing legal doctrine applicable to the adjective which would have been used to qualify the bundling practice.²³¹ As Timothy Muris states:

Currently, no compelling evidence warrants antitrust scrutiny of bundled discounts separate and apart from predatory pricing, exclusive dealing, and tying. To the extent a firm has engaged in below-cost pricing, unlawful exclusive dealing, or unlawful tying, such conduct can be better evaluated under the current legal precedent in these areas.²³²

For example, in *BA v. Commission*, the ECJ had no trouble adjudicating a problem which had been examined by the US Courts as bundling without using or relying upon the term.²³³ The ECJ also had no

230. *Hoffman La Roche*, *supra* note 26, at ¶¶ 89 & 116.

231. *See, e.g.*, *Bundled Rebates*, *supra* note 71, at 341:

If competitive harm arises because bundled rebates reduce prices to consumers in the short run, driving out rivals, and allowing higher prices in the long run, then they should be placed in the same category as predatory pricing. . . If, however, the harm to consumers arises because of higher product prices following from an increase in the price of the complement, a lower bar, akin to assessment of mergers, is appropriate.

232. *Experimental Analysis*, *supra* note 78, at 423.

233.

One may also argue that the point in time when a rebate is paid may be the most important indication that a discount is "predatory" in nature. Timing can indicate an intent to "bind" the customer to a discount program for a period of time to assure that it is paid (as in Case C 322/81, *Nederlandsche Banden-Industrie Michelin NV v. Commission* ECR 3461, [1983] and in *BA v. Commission*.) However, abuses of Article 82 are supposed to be "objective" in nature, so it is difficult, in principle, to separate an inference of predatory intention from similar behavior, such as bundled discounts on goods when they are ordered, from discounted rebates. The difficulties of determining whether *ex ante* and *ex post* discounts on multiple products are predatory or not may well also account for the differences in the results in *Le Page's* and *Cascade*.

such need to use such terms in purely EU based cases such as in *Hoffman La Roche*. The Community has been successfully using the related concept of “predatory pricing” to police distortion of the market accomplished through pricing of goods and services.²³⁴ In *Delimitis*, (in the context of Article 81) tying was considered under “exclusive dealing.” There is no reason to suppose that substituting less well-understood economic concepts like bundling for “predatory pricing” adds anything except the distraction of forcing a theoretical economic model to fit real-life business situations.

When the alleged effect is removed from the initial definition of the practice, it is the behavior’s effect and not the legal term which should be analyzed in the context of Treaty violations rather than fitting an act into “supplementary obligations” violating the Treaty. The Commission and the ECJ have found useful mechanisms and rules for making such determinations focusing on an undertaking’s behavior. Where the effects of bundling are not direct, judicial attention should focus on the spirit of the Treaty and not make end results prisoner to an imprecisely defined name.

Determinations based upon broad statements that a practice is condemned by “the very concept of bundling” add nothing to our understanding of what is permitted or what is forbidden. In the final analysis they simply mean that any practice that can be shoehorned into a broad definition may be condemned for fitting into it.

VI. CONCLUSION

Definitional guides or rules of thumb have a role in alerting dominant firms to review practices that may no longer be appropriate in light of their effects on a market. They have greater relevance in established “smokestack” industries where the effects of marketing practices have an empiric history than to evolving business sectors. Accordingly, a first look “screen” which gives lesser scrutiny to bundling practices which are less likely to be abused, or greater scrutiny to bundling practices more likely to be tying saves valuable legal resources. It is only fair, however, that a dominant undertaking with “special responsibility” be provided with more precise judicial guidance regarding which practices are subject to its more stringent scrutiny. Article 82 should not be played as a game of “gotcha.” Clear guidelines in such cases aid in avoiding litigation by self-regulation as well as lessening the deterrence of healthy welfare producing competition by dominant undertakings.

Article 82 may be broadly interpreted. Problems arise when definitions are so amorphous that the probability of false positives

234. See, e.g., *France Telecom*, *supra* note 190.

undermining increases in welfare become more pronounced. Guidance is minimal at best where the same terms may be applied indiscriminately to similar practices possessing dramatically different possibilities for distorting a market or harming competition.

It is quite difficult to find the right balance in applying competition law to bundling and tying practices. When I began working on this article I assumed that clearing up the confusion caused by fuzzy definitions would differentiate between bundling practices presenting lesser dangers to competition and those which required more focused inquiry. This proved to be a much more daunting task than anticipated. I discovered that much of the legal and economic literature uses definitions and examples that are almost as imprecise as the *CFI Judgment*'s conflation of bundling and tying. Part of the problem stems from attempting to find simple legal definitions in order to regulate so many diverse but related forms of business behavior.

Deeper inquiry into these practices is advocated in innovation industries whose economic structure may not fit "off the shelf" tying analyses developed for static economies. Dominant undertakings in innovation markets deserve better and more precise tests in new economy businesses. Such tests may not exist until there is significant experience in a new market. An initial market evaluation of "normal" market behavior as required by *Glaxo II* and *Kanal 5* provide a proper balance between applying Procrustean rules to new economy businesses, or waiting until it becomes apparent that actions by a dominant undertaking have significantly damaged the potential of a new market.

* * *